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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 234

MISSISSIPPI PUBLISHING CORPORATION,
PETITIONER,

vs.

DENNIS MURPHREE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 17, 1945.

CERTIORARI GRANTED OCTOBER 8, 1945.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [Captions omitted]

[fol. 2]

**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF MISSISSIPPI,
WESTERN DIVISION**

No. 234 Civil

DENNIS MURPHREE, Plaintiff,

vs.

MISSISSIPPI PUBLISHING CORPORATION, Defendant

COMPLAINT—Filed August 17, 1944

Now comes plaintiff by his attorneys and brings this his suit against the defendant and as grounds therefor would show and represent unto the Court the following:

[fol. 3]

1

The plaintiff, Dennis Murphree, is a citizen of Calhoun County, Mississippi, in the Western Division of the Northern Judicial District of the State of Mississippi.

2

The defendant, Mississippi Publishing Corporation, is a corporation organized and existing under the laws of the State of Delaware with its domicile at No. 100 West 10th Street, Wilmington, Delaware. The defendant has duly qualified to engage in business in the State of Mississippi and is now and, at all times hereinafter mentioned, was doing business in Mississippi, and in all of the counties in said State, including those located in the Northern Judicial District thereof. B. M. Trapp of Duck Hill, Montgomery County, Mississippi, is an agent of defendant upon whom service of process may be had. Defendant's resident agent for service of process is H. V. Watkins, Jr., Standard Life Building, Jackson, Hinds County, Mississippi.

3

This is a suit of a civil nature, between citizens of different States, and the amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00.

The defendant now owns and operates, and on the 25th day of July, 1944, and prior thereto, and at all times hereinafter mentioned, did own, and print, publish, sell and distribute throughout the State of Mississippi, and elsewhere, a number of newspapers, one of which newspapers is the "Jackson Daily News"; published at Jackson, Mississippi, and having a wide and general circulation throughout [fol. 4] out of the State of Mississippi, and elsewhere. The editor of said Jackson Daily News is now, and at all times hereinafter mentioned, was one Frederick Sullens, who, on July 25, 1944, and, at all times hereinafter mentioned, had full and complete control over, and was directly charged with and responsible for the formulation and carrying into effect of the editorial policies of said newspaper; and the said Frederick Sullens, on said date, and at all times hereinafter mentioned, was acting as the responsible agent and servant of the defendant corporation, and within the scope of the authority invested in him by said defendant.

In its said newspaper, the Jackson Daily News, the defendant published on July 25, 1944, and at all times hereinafter mentioned, did publish, on the front page thereof, an editorial column, prepared and edited by the said Frederick Sullens; the said column being captioned "The Lowdown On The Higher Ups". On July 25, 1944, the defendant Mississippi Publishing Corporation, by and through its officers, agents and servants controlling and directing the publication and distribution of the said newspaper "Jackson Daily News", and while acting as such agents and servants of said defendant, and within the scope of their authority, did on said day, print distribute and publish in the City of Jackson, Hinds County, Mississippi, and elsewhere throughout the State of Mississippi, a certain false and libelous statement of and concerning the plaintiff, which said false and libelous statement appeared on the front page of said newspaper of July 25th, 1944, and was prominently displayed thereon in the said column "The Lowdown On The Higher Ups", which said false and libelous statement was prepared and written by the said Frederick Sullens, for publication in said column "The Lowdown On The Higher

Ups", and which said false and libelous statement was as follows:

[fol. 5] "Dennis Murphree, discarded, discredited and despicable, is making motions like a man who wants to regain political power, which should be a sign for everybody to step to the rear and take a good puke. The Democratic party in Mississippi may be having some troubles but it surely does not need any of the damnable doctoring of Dennis Murphree. He is politically dead, rotten and well-nigh forgotten, even if he don't know it. Any person now willing to follow the leadership of Dennis Murphree ought to be sent over to the Whitfield hospital to have his head examined.";

the defendant, and the said Frederick Sullens, its agent and servant, then, and thereby, meaning and intending by use of the word "discarded" that plaintiff had been rejected and cast off as useless and worthless; and meaning and intending by use of the word "discredited" that plaintiff was unworthy of belief or confidence, that faith or belief in him had been destroyed, that his reputation had been injured and that disgrace and reproach had been brought upon him; and meaning and intending by use of the word "despicable" that plaintiff was fit to be despised, that he was contemptible, mean, vile and detestable, and deserved damnation; and meaning and intending by use of the words "politically rotten" that plaintiff was untrustworthy, treacherous, deceitful and corrupt.

Plaintiff would show that he is a native of Calhoun County, Mississippi; that he has always been a good, true, honest, just and faithful citizen and as such has always behaved and conducted himself; and in his native county of Calhoun and elsewhere throughout the State of Mississippi, prior to the publication by defendant of said false and libelous statement as aforesaid, he had always borne a good reputation and had been considered by those who [fol. 6] know him and by the public generally, as a true, honest, honorable and trustworthy citizen.

Although the foregoing matters alleged in this paragraph were well known to the defendant and to the said Frederick Sulens, the editor of its said newspaper, and its agent and

servant, yet the said defendant with intent to injure the reputation of the plaintiff, and to expose him to public ridicule, hatred, scorn and contempt, and to bring him into public scandal, disrepute, and disgrace; to degrade him in society and lessen him in public esteem, and lower him in the confidence and esteem of the people of the State of Mississippi and especially in the community in which he resides, did print, distribute and publish the said false and libelous statement, all as hereinbefore set forth in paragraph No. 5 hereof.

Plaintiff further avers that the words and language so used in said editorial so printed, distributed and published by the defendant as aforesaid, was by it, and by the said Frederick Sullens, the editor of its said newspaper and its agent and servant, known to be false, and untrue, and libelous per se; that the general and accepted use and meaning of the words "discarded, discredited, and despicable", as were used in the article so printed, distributed and published by the defendant, of and concerning the plaintiff as aforesaid, was to designate plaintiff as a man of dishonor, and as one who was unworthy of belief, and confidence, and who is vile and detestable, and fit to be looked down upon with disdain and scorn; that the general and accepted use and meaning of the words "politically rotten", as were used in said article so printed, distributed and published by the defendant of and concerning the plaintiff as aforesaid, was to designate plaintiff as a man who is untrustworthy, treacherous, deceitful and corrupt in character; and plaintiff [fol. 7] avers that said Frederick Sullens, editor of defendant's said newspaper and its agent and servant, intended that said words so used in said editorial as aforesaid, be so construed by those reading said article, and such construction of said words and language was so intended by the said editorial so printed, distributed and published by the defendant as aforesaid.

Plaintiff would further show that said editorial so printed, distributed and published of and concerning the plaintiff, as aforesaid, was untrue, and was so printed, distributed and published by the defendant, maliciously and in wanton

disregard of the truth, and has greatly shamed and humiliated the plaintiff.

Wherefore, plaintiff brings this his suit against the defendant for damages both actual and punitive, and demands judgment against the defendant in the sum of \$100,000.00.

Respectfully submitted, W. E. Gore, Rufus Creekmore, H. H. Creekmore, Attorneys for Plaintiff.

Creekmore & Creekmore, Of Counsel.

Summons issued to Creekmore & Creekmore, Attys, for Plaintiff, and Marshal's Return thereon, showing service on B. M. Trapp,

Summons issued to Creekmore & Creekmore, Attys, for Plaintiff, and Marshal's Return thereon showing service on H. V. Watkins, Jr.,

[fol. 8] Omitted from the printed record, pursuant to Rule 23 of this Court.

Creekmore and Creekmore, Attorneys at Law, Standard Life Building, Jackson, Mississippi

H. H. Creekmore, Rufus Creekmore, Wade H. Creekmore.

August 18, 1944.

Mr. H. D. Stephens, Clerk, Oxford, Mississippi

DEAR HUBERT:

Re: Murphree vs. Mississippi Publishing Corporation

Please file the enclosed demand for trial by jury which by oversight we failed to send you with the complaint.

Yours very truly, Creekmore and Creekmore, By H. H. Creekmore.

HHC/dp

[fol. 9] IN UNITED STATES DISTRICT COURT

DEMAND FOR JURY TRIAL—Filed August 19, 1944

Now comes the plaintiff by his attorneys and demands a trial by jury of all issues in this cause.

Respectfully, W. E. Gore, Creekmore & Creekmore,
Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION TO DISMISS—Filed September 6, 1944

Comes the Mississippi Publishers Corporation, Defendant in the above entitled cause, by its attorneys, and entering its special appearance solely and only for objecting to jurisdiction over it by the Court, shows unto the Court that the Defendant is a foreign corporation, existing under the laws of the State of Delaware, domiciled in Wilmington, in said State. That its principal and only office and place of business, in the State of Mississippi is at Jackson, in the First Judicial District of Hinds County, Mississippi, within the jurisdiction of the United States District Court for the Southern District of Mississippi. That the Defendant has never been domesticated under the laws of the State of Mississippi; that it has appointed, in accordance with the laws thereof, an agent for service of process, to wit H. V. Watkins, Jr., a resident of the First Judicial District of Hinds County, Mississippi; that it has not transacted any business in the Northern District of Mississippi within the [fol. 10] jurisdiction of this Court; that it has no office, officer, agent or servant in the Northern District of Mississippi; that the cause of action which the Plaintiff has against the Defendant, if any at all, which is denied, accrued and arose in the Southern District of the State of Mississippi, and not in the Northern, and no part thereof occurred, accrued or arose in the Northern District of Mississippi; that the Defendant is not a resident of the Northern District of the State of Mississippi; that it has no agent in the Northern District of Mississippi upon whom service of process may be had; that there is no other Defendant named in said cause except this Defendant, and process could not therefore be issued to the United States

Marshal of the Southern District of Mississippi for service on this Defendant.

The Defendant shows unto the Court that the Plaintiff is not a resident or inhabitant of the Northern District of Mississippi, but is a resident citizen and inhabitant of the Southern District of Mississippi, in the First Judicial District of Hinds County, Mississippi.

Wherefore, the Defendant says:

First

This Court has no jurisdiction over the subject matter.

Second

This Court has no jurisdiction over the person of the Defendant.

Third

The venue in the case is improperly laid.

[fol. 11]

Fourth

The process issued is insufficient and void under the law.

Fifth

The attempted service on the defendant is insufficient.

Wherefore, the Defendant moves the Court to dismiss the Plaintiff's complaint for all of the reasons hereinabove set out.

Mississippi Publishers Corporation, by Watkins & Eager, by Watkins & Avery, Attorneys for Defendant.

The Plaintiff and his attorneys of record will take notice that the Defendant will present the foregoing Motion to Dismiss plaintiff's complaint, with proof attached, before the Honorable Allen Cox, United States District Judge, at Oxford, Mississippi, in the United States District Court Room on September 21st, 1944, at 10 o'clock A. M., or as soon thereafter as may be convenient to the Court and counsel.

Signed this, the 5th day of September, 1944.

Mississippi Publishers Corporation, by Watkins & Eager, by Watkins & Avery, Attorneys for Defendant.

[fol. 12] I, William H. Watkins, of counsel for the Defendant in the above entitled cause, certify that I have this day sent by United States mail, postage prepaid, to Creekmore & Creekmore, Attorneys at Law, Standard Life Building, Jackson, Mississippi, and to W. E. Gore, Deposit Guaranty Bank Building, Jackson, Mississippi, Plaintiff's Attorneys, a true and correct copy of the foregoing Motion, with proof attached.

Signed this 5th day of September, 1944.

W. H. Watkins.

STATE OF MISSISSIPPI

APPLICATION FOR HOMESTEAD EXEMPTION

STATE AND COUNTY TAXES, 1942
(MADE UNDER THE PROVISIONS OF CHAPTER 127, LAWS OF 1940)
TO BE FILED WITH COUNTY TAX ASSESSOR
BEFORE JUNE 1, 1943

Hinds

COUNTY

I, Dennis (None) Murphy of Robinson Rd Jackson Miss.
(First Name) (Middle or Maiden Name) (Last Name) (Street Address) (Post Office)
do hereby make application to the Board of Supervisors of said county for exemption from 1942 maintenance taxes on the property described as follows:

	DESCRIPTION	A.	T.	R.	Number Acres	Number and Kind of Buildings
1.	<u>2.5a 6" E" 8" d</u> (Line or show line the assessment on which dwelling is located)					
2.	<u>by Road</u>	<u>6</u>	<u>5</u>	<u>16</u>	<u>2.5</u>	<u>1 Res.</u>
3.						
4.						
5.						
6.						

The following statements are made and sworn to in support of this application:

- Is the full-time and only home of your family group located on the above property, and did you actually reside therein January 1, 1942? Answer Yes or No yes
If not, answer Question 14 below.
- Do you or your family group maintain a home in any other state? Answer Yes or No no
- Marital status on January 1, 1942. Check: Married (✓) Widowed () Widower () Single () Divorced ()
If married, give full name of wife or husband Clara Martin Murphy (First Name) (Middle or Maiden Name) (Last Name)
- Race. Check: White (✓) Colored ()
- Is the title to this property in your own name alone? Answer Yes or No yes
If not, give full names of all owners.

- Do any joint owners secure Homestead Exemption on other property? If so, when.
- How did you acquire this property? Check: Deed (✓) Court Decree () Lease of School Lands () Will ()
Contract or Conditional Agreement () Date Acquired 1925 Recorded in Book 160 Page 329
If acquired by inheritance without will, check () and answer Question 13 below.
If acquired after July 1, 1938, answer Question 13 below.
- Do you, by your own effort or by personal supervision of tenants, produce crops on this land from which a substantial portion of your family living is derived? Answer Yes or No no
- Did you secure an exemption on this dwelling in 1938? (yes), 1939? (yes), 1940? (no), 1941? (yes)
Answer Yes or No no
- Does any of this property lie in an incorporated municipality? Answer Yes or No yes
If so, does all the land join? Answer Yes or No yes
- Is any part of your dwelling house used for any commercial, professional or other business activities? Answer Yes or No no
If so, explain in detail.
- Is dwelling divided into apartments, each composing a separate living unit? Answer Yes or No no
If so, number of such units, including the one you occupy?
- Do you rent any bedrooms or have any boarders? Answer Yes or No no
If so, number of rooms rented. Number of boarders or paying guests.
- If any of the property was acquired after July 1, 1938:
(a) From whom was it acquired?
(b) Did you, with your own means, pay in full for it before January 1, 1942? Answer Yes or No
(c) If not, who financed the transaction for you?
(d) Full purchase price or cost to you? Unpaid principal January 1, 1942 \$
- If answer to Question No. 1 above is "No," answer A, B, or C, below:
(a) If application is filed under Section 6(e) of the law, what relation are you to the persons living in the home?
Are they wholly dependent upon you for support? Answer Yes or No
(b) If application is filed under Section 9(d) of the law, how much time each year do you spend in the home?
Is any revenue received or promised by others for use of the property?
Do you own or maintain a home elsewhere?
(c) Is application filed under Section 9(i) of the law?
- If this property was acquired by inheritance without will, state:
Full name of deceased owner. Date of death.
How and when did the deceased acquire title? Date.
What is your relation to the deceased.

Witness my hand and subscribed before me this 2 day of May 1942
C. C. Speight
(Title of Officer) D. R.

By Dennis Murphy
(Signature) (Attorney—Agent—Guardian)
If signed by attorney, agent or guardian, indicate which and attach certified copy of authority or give every number.

The application on the reverse side hereof has, this the

day of

Nov 2 1942

194

Allowed
(Allowed or Disallowed)

by the Board of Supervisors of said county as shown below

H. A. Canada
(President, Board of Supervisors)

ENTRY OF ALLOWANCES BY BOARD AND BY STATE TAX COMMISSION

Item	Page No.	Line No.	Number Acres	Assessed Value Land	Assessed Value Buildings	Tax Dollars Allowed	Real Dollars	School Dollars
1.	1127	4	2 ⁵	500	3000	2500	14 5	<i>None</i>
2.								
3.								
4.								
5.								
6.								
TOTAL								

THE STATE OF MISSISSIPPI,

COUNTY OF HINDS

I, Frank T. Scott, Clerk of the Chancery Court, hereby certify that the above is a true copy of that certain Application for Homestead Exemption of State and County Taxes for the year of 1942 of Dennis Murphree, Robins Road, Jackson, Mississippi, as same now in my office at Raymond, Second District of Hinds County, Mississippi.

Given under my hand and seal of office this the 25th day

1944.

Frank T. Scott, Chancery Clerk

By A. R. EppersonA. R. Epperson, D. C. 2nd Dist.
Hinds County, Mississippi

Hinds

COUNTY

STATE AND COUNTY TAXES, 1942-3
(MADE UNDER THE PROVISIONS OF CHAPTER 127, LAWS OF 1940)
TO BE FILED WITH COUNTY TAX ASSESSOR
BEFORE JUNE 1, 1943

I, Dennis (none) Murphree Robinson R. Jackson,
(First Name) (Middle or Maiden Name) (Last Name) (Street Address) (Office)
herby make application to the Board of Supervisors of said county for exemption from 1942 maintenance taxes on the property described as follows:

Item	DESCRIPTION	A.	T.	R.	Number Acres	Number and Kind of Buildings
1.	2.5 ac. E 2 1/2 E 2 S of Road					
2.		6	5	16	25	1 Res.
3.						
4.						
5.						
6.						

The following statements are made and sworn to in support of this application:

- Is the full-time and only home of your family group located on the above property, and did you actually reside thereon January 1, 1942? yes
If not, answer Question 14 below. Answer Yes or No yes
- Do you or your family group maintain a home in any other state? Answer Yes or No no
- Marital status on January 1, 1943 Check: Married (☒) Widower (☐) Widower (☐) Single (☐) Divorced (☐)
If married, give full name of wife or husband Clara Martin Murphree
(First Name) (Middle or Maiden Name) (Last Name)
- Race Check: White (☒) Colored (☐)
Is the title to this property in your own name alone? Answer Yes or No yes
If not, give full names of all owners.
- Do any joint owners secure Homestead Exemption on other property? If so, where.
- How did you acquire this property? Check: Deed (☒) Court Decree (☐) Lease of School Lands (☐) Will (☐) Contract or Conditional Agreement (☐) Date Acquired 1925 Recorded in Book 160 Page 329
If acquired by inheritance without will, check (☐) and answer Question 15 below.
If acquired after July 1, 1938, answer Question 15 below.
- Do you, by your own effort or by personal supervision of tenants, produce crops on this land from which a substantial portion of your family living is derived? Answer Yes or No no
- Did you secure an exemption on this dwelling in 1938? (yes), 1939? (yes), 1940? (yes) 1941? (yes) 1942? (yes)
Does any of this property lie in an incorporated municipality? Answer Yes or No no
- If so, does all the land join? Answer Yes or No yes
- Is any part of your dwelling house used for any commercial, professional or other business activities? Answer Yes or No no
If so, explain in detail.
- Is dwelling divided into apartments, each composing a separate living unit? Answer Yes or No no
If so, number of such units, including the one you occupy?
- Do you rent any bedrooms or have any boarders? Answer Yes or No no
If so, number of rooms rented. Number of boarders or paying guests.
- If any of the property was acquired after July 1, 1938:
(a) From whom was it acquired?
(b) Did you, with your own means, pay in full for it before January 1, 1942?
(c) If not, who financed the transaction for you? Answer Yes or No no
(d) Full purchase price or cost to you? \$ Unpaid principal January 1, 1942? \$
- If answer to Question No. 1 above is "No," answer A, B, or C, below:
(a) If application is filed under Section 6(e) of the law, what relation are you to the persons living in the home? Are they wholly dependent upon you for support? Answer Yes or No no
(b) If application is filed under Section 9(d) of the law, how much time each year do you spend in the home? Is any revenue received or promised by others for use of the property?
Do you own or maintain a home elsewhere?
- Is application filed under Section 9(i) of the law?
If this property was acquired by inheritance without will, state:
Full name of deceased owner. Date of death.
How and when did the deceased acquire title? Date.
What is your relation to the deceased.

and subscribed before me this 24 day
May 1943
C. D. Spight
(Title of Officer)

By: Dennis Murphree
(Signature)
(Answer—Agent—Guardian)
If signed by attorney, agent or guardian, indicate which and attach certified copy of authority or give exact number.

DUPLICATE
RETAINED BY CLERK

The application on the reverse side hereof has, this the Sep 8 - 1943 day of 1943
 been Allowed (Allowed or Disallowed) by the Board of Supervisors of said county as shown below.

H. A. Cannada
 (President, Board of Supervisors)

ENTRY OF ALLOWANCES BY BOARD AND BY STATE TAX COMMISSION

Item	Page No.	Line No.	Number Acres	Assessed Value Land	Assessed Value Buildings	Total Assessment Allowed	Real Estate	School District
1.	1127	4	2.5	500	2000	2500	145	Township 9 N
2.								
3.								
4.								
5.								
6.								
TOTAL								

THE STATE OF MISSISSIPPI,
 COUNTY OF HINDS

I, Frank T. Scott, Clerk of the Chancery Court, hereby certify that the above is a true copy of that certain Application for Homestead Exemption of State and County Taxes for the year of 1943 of Dennis Murphree, Robins Road, Jackson, Mississippi, as same now in my office at Raymond, Second District of Hinds County, Mississippi.

Given under my hand and seal of office this the 25th day
 1944.

Frank T. Scott, Chancery Clerk

By A. R. Epperson
 A. R. Epperson, D. C. 2nd Dist.
 Hinds County, Mississippi.

APPLICATION FOR HOMESTEAD EXEMPTION

STATE AND COUNTY TAXES, 1944

(MADE UNDER THE PROVISIONS OF CHAPTER 127, LAWS OF 1940 AND AMENDMENTS)
DUPLICATE RETAINED BY THE CLERK

Hinds

COUNTY

Dennis (None) Murphree

White (X)
Colored ()

Robinson Rd. Jax

(First Name)

(Middle Name)

(Last Name)

(St. Address)

(Post Office)

I hereby make application to the Board of Supervisors of said County for Exemption from 1944 maintenance taxes on the property described below. All statements are as of January 1, 1944, as the law requires.

Item	DESCRIPTION	S.	T.	R.	No. Acres	Number and Kind of Buildings
1	194 7 ft. S/A Robinson Rd. x (Line on above line the monument on which building is located)	6	5	1 E 2.5	1 Res.	
2	560.4 ft. N & S. SE Cor SE4 NE4 & NE					
3	Cor NE4 SE4					
4						
5						
6						
7						

(1) I am (or am not) a bona fide, legal resident of Mississippi Yes (X) No ()

(2) I am married (X), widow (), widower (), single (), divorced (), separated ().

(3) My wife's (or husband's) full name is (or is separated)

Wlars Martin Murphree

First Name

Middle or Maiden

Last

(4)-(a) Legal title to all this property is (or is not) in my own name alone Yes (X) No ()

(b) The full names of all other joint owners are

First Name

Middle or Maiden

Last

First Name

Middle or Maiden

Last

(If additional names, show on back)

(5)-(a) This property was acquired by deed (X), court decree (), loss of school lands (), will (), or contract or conditional agreement or conveyance ()

Date of Acq. 1925 Rec. Bk. 160 Pg. 329

Rec. Bk.

Pg.

Rec. Bk.

Pg.

Or (b) it was acquired by inheritance without will from

First Name

Middle or Maiden

Last

who was my _____ who died _____

Relationship to me

Date

and whose title was acquired by _____

Deed or inventory

dated _____ Year _____ Recorded, Book _____ Page _____

(6)-(a) The Property listed above as item No. _____ was acquired after July 1, 1938, from _____

(b) The full price or cost to me of land and improvements was _____ principal.

(c) I have paid thereon \$ _____, leaving balance on

Jan. 1, 1944, of \$ _____ principal.

(d) It was financed for me by _____

(7) Part of the land lies (or does not) in an incorporated municipality No (X) Yes ()

All the land joins (or does not) Yes (X) No ()

(8)-(a) This is (or is not) the full time and only home of my family group, wherein we reside continuously, (or) Yes (X) No ()

(b) This application is filed under Sec. 6 (a) and the persons living in this home are my _____

Relationship to me

They are (or are not) wholly dependent on me for support, (or) Yes () No ()

(c) This application is filed under Sec. 9 (d).

During each year my family group occupies the home (or does not) _____ months Yes () No ()

(d) Rental is not (or is) received from or premised by others for use of all () or part () of the property No (X) Yes ()

(9)-(a) The dwelling is occupied (for housekeeping) by _____ family groups other than my own, or _____ Number

(b) _____ rooms are rented to _____ people for dormitory use only; No meals prepared or served and no equipment or arrangement for preparing and serving meals.

(c) We have _____ mobile boarders.

(10) Part of the property (land or buildings) is (or is not) used for commercial, professional or other business activity, No (X) Yes ()

(If so used, explain on back)

(11) Exemption was granted on this property for 1943 to _____

Same

First Name

Middle or Maiden

Last

(12)-(a) Agricultural crops, from which a substantial part of my family support is derived, (Sec. 5 (g) of the law) are (or are not) regularly produced hereon by our own work or by personal, legal supervision of share croppers or wage hands Yes () No (X)

(b) Part of the property is (or is not) rented or leased to others No (X) Yes ()

(c) The dwelling is (or is not) included in the rented part No (X) Yes ()

The applicant herein has, in person, sworn up and signed this application

before me on this _____ day of _____

Notary

Mrs. Clinton Hester, D.A.

Notary Public, or

By:

Dennis Murphree

(Under Signature of Applicant)

The above Statements are made and sworn to by me as being true and correct and as the basis of this application.
If signed by attorney, agent or guardian, indicate which and attach certified copy of authority or give name number.

The application on the reverse side hereto has, this the _____ day of _____, 1944
been _____ by the Board of Supervisors of said county as shown below.
(Allowed or Disallowed)

(President, Board of Supervisors)

ENTRY OF ALLOWANCES BY BOARD OF SUPERVISORS

Item	Page No.	Line No.	Number Approved	Amount Value Land	Amount Value Buildings	Total Amount Allowed	Amount of Amount Not Allowed	Kind Disallow	School Disallow
1									
2									
3									
4									
5									
6									
TOTAL									

Frank T. Scott, Chancery Clerk
D.C. *Wm. J. Scott*

1944.

I, Frank T. Scott, Clerk of the Chancery Court of the aforesaid County and State, do hereby certify that the above and foregoing is a true and correct copy of HONESTY EXEMPTION as appears on file in my office. Given under my hand and official seal, this the 24th day of August,

STATE OF MISSISSIPPI
COUNTY OF HINDS

CLEAR'S CERTIFICATE

[fol. 19] Application for Homestead Exemption

State and County Taxes, 1941

(Made Under the Provisions of Chapter 127, Laws of 1940)

To Be Filed With County Tax Assessor Before June 1, 1941

STATE OF MISSISSIPPI,

Hinds County:

I, Dennis (first name) (None) (middle name) Murphree (last name), of Robinson Rd. (Street address), Jackson, Miss. (Post office), hereby make application to the Board of Supervisors of said county for exemption from 1941 maintenance taxes on the property described as follows:

Item 1.

Description: 2.5a E2 E2 E2 S of Road (List on above line the assessment on which dwelling is located).

S. 6.

T. 5.

R. 1E.

Number acres:

Number and Kind of Buildings: 1 Res.

Item

2.

3.

[fol. 20] 4.

5.

6.

The following statements are made and sworn to in support of this application:

1. Is the full-time and only home of your family group located on the above property, and did you actually reside thereon January 1, 1941? Answer Yes or No. Yes. If not, answer Question 14 below.

2. Do you or your family group maintain a home in any other State? Answer Yes or No. No.

3. Marital status on January 1, 1941. Check: Married (X), Widow (), Widower (), Single (), Divorced ().

If married, give full name of wife or husband. Clara (first name) Martin (Middle or Maiden Name) Murphree (Last Name).

4. Race. Check: White (X), Colored ().

5. Is the title to this property in your own name alone? Answer yes or No. Yes.

If not, give full names of all owners.

6. How did you acquire this property? Check: Deed (X), Court Decree (), Lease of School Lands (), Will (), Contract or Conditional Agreement (). Date Acquired 1925 Recorded in Book Page . If acquired by inheritance without will, check () and answer Question 15 [fol. 21] below. If acquired after July 1, 1938, answer Question 13 below.

7. Do you, by your own effort or by personal supervision of tenants produce crops on this land from which a substantial portion of your family living is derived? Answer Yes or No. No.

8. Did you secure an exemption on this dwelling in 1938? (No), 1939? (Yes), 1940? (Yes).

9. Does any of this property lie in an incorporated municipality? Answer Yes or No. No.

If so, does all the land join. Answer Yes or No.

10. Is any part of your dwelling house used for any commercial, professional or other business activities? Answer Yes or No. No.

If so, explain in detail.

11. Is dwelling divided into apartments, each composing a separate living unit? Answer Yes or No. No.

If so, number of such units, including the one you occupy?

12. Do you rent any bedrooms or have any boarders? Answer Yes or No. No.

If so, number of rooms rented Number of boarders or paying guests

13. If any of the property was acquired after July 1, 1938:

[fol. 22] (a) From whom was it acquired?

(b) Did you, with your own means, pay in full for it before January 1, 1941? Answer Yes or No.

(c) If not, who financed the transaction for you?

(d) Full purchase price or cost to you? \$
Unpaid principal January 1, 1941? \$

14. If answer to Question No. 1 above is "No", answer a, b, or c below:

(a) If application is filed under Section 6 (e) of the law, what relation are you to the persons living in the home?

Are they wholly dependent upon you for support? Answer Yes or No.

(b) If application is filed under Section 9 (4) of the law, how much time each year do you spend in the home?

Is any revenue received or promised by others for use of the property?

Do you own or maintain a home elsewhere?

(c) Is application filed under Section 9 (i) of the law?

15. If this property was acquired by inheritance without will, state:

Full name of deceased owner

Date of death. How and when did the deceased acquire title? Date

[fol. 23] What is your relation to the deceased?

Full names of any other heirs

Sworn to and subscribed before me this the 7 day of Jan., 1941. C. O. Speight, C. A. (Title of Officer).

Dennis Murphree (Usual Signature of Applicant),
by — — —, Signature (Attorney—Agent—Guardian).

If signed by attorney, agent or guardian, indicate which and attach certified copy of authority or give cause number.
441 - 16.

The application on the reverse side hereof has, this the day of Sep. 2, 1941, been Allowed or Disallowed by the Board of Supervisors of said county as shown below.

H. A. Cannada, President, Board of Supervisors.

Entry of Allowances by Board and by State Tax Commission

Item 1.

Page No.: 441.

Line No.: 16.

Number Acres: 25.

Assessed Value Land: 500.

[fol. 24] Assessed Value Buildings: 2000.

Total Exemption Allowed: 2500.

Road Districts: 1 & 5 Rd.

School Districts: None.

Item

2.

3.

4.

5.

Total

CLERK'S CERTIFICATE

STATE OF MISSISSIPPI,
County of Hinds:

I, Frank T. Scott, Clerk of the Chancery Court of the
aforenamed County and State, do hereby certify that the
above and foregoing is a true and correct copy of Home-
stead Exemption as appears on file in my office.

Given under my hand and official seal this the 24th day
of August, 1944.

Frank T. Scott, Chancery Clerk, by Dee Chastang,
D. C. (Seal.)

[fol. 25] AFFIDAVIT OF MRS. MARIETTA BISHOP

STATE OF MISSISSIPPI,
Hinds County:

Personally came before me, the undersigned officer in
and for the aforesaid State and County; the within named
Mrs. Marietta Bishop, who by me being sworn, makes oath
that she is 41 years of age. That prior to her marriage her
name was Marietta French, and that she is a native of Hinds
County, Mississippi. That she is by occupation a stenog-

rapher, bookkeeper and clerical assistant. That about the year 1930, she entered the employ of the Walthall Hotel in Jackson, Mississippi, which was then being operated by the A. H. Alvis Company, a lessee. In the year 1931 the Walthall Hotel Company, the owner of such corporation, took over the management thereof. Mr. E. O. Spencer, of Jackson, Mississippi, was and is a large stockholder in said company and was then Vice-President and General Manager of said hotel. That affiant became well acquainted with Lt. Governor Dennis Murphree at that time. That he was engaged in business with Mr. E. O. Spencer and Mr. John Spencer under the firm style and name of Spencer, Murphree & Spencer. That such partnership conducted a general insurance agency, negotiating contracts of fire, fidelity, surety and casualty insurance. That the office of said partnership was on the second floor in the Walthall Hotel, and there Governor Murphree had his office and remained transacting said partnership business in and about said office. That affiant while in the employ of the Walthall Hotel, was a bookkeeper, stenographer and general assistant of the Manager; that she frequently had occasion to go to the office of Spencer, Murphree & Spencer, was well acquainted with them all, and upon occasion did stenographic work for Governor Murphree in the office of the firm; that she saw and was well acquainted with the stationery used in the office, and upon the stationery was printed the name of the firm, Spencer, Murphree & Spencer [fol. 26] with the names of the individual member of the partnership printed thereupon; which included the name of Governor Murphree. That she became at that time acquainted with Governor Murphree's family; that they had a home out on the Robinson Road, where Governor Murphree and his family lived. His family consisted of himself and his wife, Mrs. Murphree, and four children, one son and three daughters. Affiant was personally acquainted with the members of the family. The four children were young when Governor Murphree moved to Jackson and they received their education, all of them, in the public schools of Jackson, Mississippi, which they attended. That whether they went off to college or not affiant is unable to say, but affiant is well acquainted with the fact that the Murphree family had a well-established home, where they resided and lived continuously, near the City of Jackson. One of Governor Murphree's daughters taught in the city schools

of Jackson, Mississippi, for a number of years. One of his daughters was in the employ of the Department of Archives and History in Jackson, Mississippi. Affiant left the employ of the Walthall Hotel in 1939, and the firm of Spencer, Murphree & Spencer was still in existence, carrying on business in offices on the second floor of the Walthall Hotel in Jackson, Mississippi, where Governor Murphree had occupied and maintained an office, to the knowledge of affiant, for many years. Affiant knows that the Murphree family had kin folks in Calhoun County, Mississippi; knows that they went back to Calhoun County to vote, but never heard Governor Murphree at any time make a statement of any intention to return to Calhoun County to make his home. Affiant further knows that Governor Murphree still maintains his office on the second floor of the Walthall Hotel, and has continuously occupied such office to affiant's knowledge, since the year 1931. Affiant does not know as to whether or not the firm of Spencer, Murphree & Spencer is still in existence or not. For a number of years Governor Murphree was engaged, in the City of Jackson, in conducting travel tours under the firm style and name of "Know Mississippi Better", or "Spencer-Murphree Tours"; that such tours were organized, managed and conducted from the office of Governor Murphree on the second floor of the Walthall Hotel. Affiant cannot state what year the operation of said tours began, but knows that the same were conducted for several years, up to about two years ago.

Affiant has turned to the telephone book of the City of Jackson and finds that Governor Murphree carries a telephone at his residence near the City of Jackson, being number 4-4190; that Governor Murphree has carried a telephone at his residence in his own name ever since he has resided in or near the City of Jackson, Mississippi; that the Spencer-Murphree Tours has always had, since its organization, a telephone in the City of Jackson, the telephone number at the present time being 2-0634; that in the 1943 edition of the Jackson, Mississippi, City Directory, at page 440, is found the following:

"Murphree Dennis (Clara) Lt Gov State of Miss & (Murphree-Ford Trav Bureau) h Robinson Rd

"Murphree Ford Travel Bureau (Dennis Murphree) 205 Walthall Hotel."

Affiant states that the same information in respect to Governor Dennis Murphree and his family has been inserted and will be found in each and every Directory of the City of Jackson since Governor Murphree began business in said city.

Affiant is informed that Governor Murphree and the members of his family are now and for many years have been members of the Capitol Street Methodist Church, Jackson, Mississippi.

Marietta Bishop.

[fol. 28] Sworn to and subscribed before me this, the 5th day of September, 1944. John Putnam, Notary Public. (Seal.) My Commission Expires April 29, 1948.

AFFIDAVIT OF WALTER G. JOHNSON

STATE OF MISSISSIPPI,
County of Hinds:

Personally came before me, the undersigned officer, in and for the aforesaid State and County, the within named Walter G. Johnson, who by me being duly sworn, makes oath that he is an officer and agent of and for the Mississippi Publishers Corporation, erroneously used as "Mississippi Publishing Corporation", in the above entitled case. That he is the Treasurer of said corporation and is the proper person to make this affidavit; that in such capacity the affiant has custody and control of the books, records and papers of said corporation.

The said Walter G. Johnson further makes oath that the Mississippi Publishers Corporation is a foreign corporation, organized under the laws of Delaware, and domiciled at Wilmington, in said State; that it has never surrendered its charter or became domiciled under the laws of the State of Mississippi, or any other State than that of its creation. Affiant states, however, that the said Mississippi Publishers Corporation, defendant in the above entitled suit, has been duly admitted to carry on business in the State of Mississippi and, as a condition precedent thereto, in accordance with the laws of the State of Mississippi, has appointed H. V. Watkins, otherwise known as H. V. Watkins, Jr., an actual citizen and resident of the First Judicial District of [fol. 29] Hinds County, Mississippi, as its agent for service

of process; that it has no other agent for service of process anywhere in the State of Mississippi.

Affiant states that the principal office and place of business of the said company is situated in the City of Jackson, in the First Judicial District of Hinds County, Mississippi, where its officers reside, as well as its agent for service of process, where its books, records and papers are kept, and all of its business transacted and carried on and direction given for the carrying on of the business of said corporation.

Affiant states that it has never at any time, either prior to or since the commission of the alleged wrongs complained of in plaintiff's complaint, been engaged in any business whatsoever of any kind in the Northern District of the State of Mississippi; that it has never had or maintained an office, or place of business, any officer, agent, or servant, in the Northern District of Mississippi; that it has never at any time had any agent in the Northern District of Mississippi within the jurisdiction of this Court upon whom service of process could be had.

Affiant alleges that the said Mississippi Publishers Corporation is engaged, exclusively, in the publication of newspapers wholly published by the said defendant in the City of Jackson, in the First Judicial District of Hinds County, Mississippi; that the newspaper published by the defendant containing the publication complained of in this case was not published in the Northern District of Mississippi, but was composed, issued, delivered and circulated in the City of Jackson, in the First Judicial District of Hinds County, Mississippi, at the principal place of business of defendant, where the newspapers complained of were printed, published, issued, circulated and first read, all of which took place in the City of Jackson, in the First Judicial District of Hinds County, Mississippi, no part of which took place within the Northern District of Mississippi within the jurisdiction of this Court.

Affiant states that the said Mississippi Publishers Corporation has at no time carried on any business whatsoever in the Northern District of Mississippi, and that if the plaintiff has any cause of action against this defendant by reason of the publication complained of, which is denied, that the same did not arise, occur or accrue in the Northern District of Mississippi, but in the City of Jackson, in the First Judicial District of Hinds County, Mississippi, where

said newspaper was composed, printed, published, circulated, issued and first read; that if the said newspaper containing the publication complained of circulated at all in the Northern District of Mississippi, it was for the reason that upon the day and date of said publication, and at all times prior and since said date, it had divers and sundry subscribers in the Northern District of Mississippi, to whom said paper was sent by United States Mail, postage prepaid, by delivering the same to the United States Post Office, at Jackson, Mississippi, and by reason of the fact that the defendant on the day and date of the issuance of the publication complained of transmitted a number of copies of its newspaper to one B. M. Trapp, at Duck Hill, Mississippi, in Montgomery County, who purchased said papers from the defendant, paid the defendant therefor; that the said B. M. Trapp is an independent dealer in newspapers, having bought said papers from this defendant and sold the same in his own name, on his own account, and not as agent, servant or employee of the Mississippi Publishers Corporation; that the said Trapp had certain subscribers therefor who are his own personal customers, the names of whom are unknown to affiant, and that the said dealer received said newspapers, sold and delivered the same to his customers at such time, price, and upon such terms, and upon such conditions as were determined by him, whether for cash or [fol. 31] credit, and that the said Trapp paid the defendant for the number of papers delivered to him, regardless of whether he was to sell them or not, or collect for the same after selling them; that the said B. M. Trapp sold said papers in his own name, for his own account, and not as agent, servant or employee of the Mississippi Publishers Corporation, and in the sale and delivery of said newspapers he selected, employed and paid his own assistants, if he had any, having the right to discharge the same; that he used his own facilities, selected his own method of distribution of said newspapers, the time and occasion upon which the same would be delivered, and the manner of the delivery thereof, over which this defendant had no right of control or direction and did not endeavor to exercise the same in any manner.

Affiant makes oath that the said B. M. Trapp had no power or authority to transact any business for the said Mississippi Publishers Corporation, to make any contracts or arrangements for it, or to represent it in any way what-

soever. The plaintiff attempted to get service of process upon the Mississippi Publishers Corporation by causing a copy thereof to be served upon the said B. M. Trapp, but that the said B. M. Trapp had no authority to represent the said Mississippi Publishers Corporation, was not authorized to receive process for it, and no valid process could be had upon the said defendant by attempting service upon the said B. M. Trapp. Affiant states that newspapers sold by the said corporation to the said B. M. Trapp, as well as divers and sundry other dealers in the Northern District of Mississippi, are transported to said dealers, either by a common carrier, or private contract carrier. Affiant states that the Mississippi Publishers Corporation is not a citizen, resident or inhabitant of the Northern District of Mississippi.

Affiant states that the plaintiff has attempted to get service of process upon the said defendant by serving process upon H. V. Watkins, Jr., in the City of Jackson, in the First [fol. 32] Judicial District of Hinds County, Mississippi, where the said agent for service of process resides, and not elsewhere.

Affiant states, as appears from the complaint in said cause, the Mississippi Publishers Corporation is the only defendant to said cause, and that no legal process would issue to the United States Marshal of the Northern District of Mississippi for service upon the Mississippi Publishers Corporation, or its agent for service of process, in the Northern District of Mississippi, and no jurisdiction of any kind, territorially or otherwise, could be obtained over the Mississippi Publishers Corporation by reason of said attempted service of process.

The Mississippi Publishers Corporation has never consented to be sued in the Northern District of Mississippi and has never waived the lack of jurisdiction, territorially or otherwise, of said Court over it.

Affiant states that he is well acquainted with the plaintiff, Dennis Murphree; that he moved to the First Judicial District of Hinds County, Mississippi, when elected Lieutenant Governor of the State of Mississippi about January, 1924; that he acquired and built a home near the City of Jackson, where he has resided ever since and so resides at the present time, and where he has reared his family; that the said Dennis Murphree was Lieutenant Governor during the administration of Governor Whitfield and during the

administration of Governor Conner, as well as during the administration of Governor Paul B. Johnson; that he was not Lieutenant Governor during the administration of Governor Bilbo; that the duties of his office as Lieutenant Governor did not require him to move to Jackson for the performance thereof, but that he has continually, since January, 1924, up to the present date, resided in a residence situated upon a piece of ground, purchased by him upon the first day of November, 1924, from E. S. Brashier, certified copy of which deed is shown in the exhibits attached [fol. 33] to motion to dismiss in this case. Affiant states that during all of these years the said Dennis Murphree has been engaged in business in the City of Jackson, with an office in the Walthall Hotel Building; that he has been engaged for a number of years in organizing travel tours over the United States and in various lines of insurance business.

Walter G. Johnson.

Sworn to and subscribed before me, this the 5th day of September, 1944. Laura James, Notary Public, My Commission Expires June 4, 1946. (Seal.)

H. V. Watkins & Ralph B. Avery, Lawyers
815-821 Standard Life Building,
Jackson, Mississippi

Henry Vaughan Watkins,
Ralph B. Avery,
Myer A. Lewis, Jr.,
Henry Vaughan Watkins, Jr.

John M. Putnam.

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September 7, 1944.

Mr. Hubert D. Stephens, Clerk of the United States District Court, Oxford, Mississippi

DEAR MR. STEPHENS:

In re: Dennis Murphree v. Mississippi Publishers Corporation—Civil Action No. 234.

On September 5th, 1944, we mailed you Defendant's Motion to Dismiss complaint in the above matter. In attaching [fol. 34] the proofs thereto, we inadvertently omitted at-

taching the affidavit of N. R. Lamar, of Calhoun County, Mississippi.

We are enclosing you herewith the above mentioned affidavit of N. R. Lamar, and will thank you to attach the same to the Motion to Dismiss.

We will thank you to acknowledge receipt of this affidavit.

Yours very sincerely, Watkins & Eager, Watkins & Avery.

HVW/j
Encl.

AFFIDAVIT OF N. R. LAMAR

Filed this 9 day of Sept., 1944

STATE OF MISSISSIPPI,
Calhoun County:

Personally came and appeared before me, the undersigned authority in and for the jurisdiction aforesaid, N. R. Lamar, to me well known, who being first duly sworn, states on his oath as follows:

That he is sixty-four years of age, and a resident of Calhoun County, Mississippi, since the year 1903. That until three years ago he resided in Pittsboro, Calhoun County, Mississippi. That he has known Dennis Murphree for many years. That Dennis Murphree resided in Pittsboro, Calhoun County, Mississippi, until his first election as Lt. Governor of the State of Mississippi. That at the time of his election Dennis Murphree moved to Jackson, Mississippi, where he has resided continuously from that time to the present. That at the time of his election, Dennis Murphree sold all property which he owned in Calhoun [fol. 35] County, Mississippi, excepting a small tract of land about one-half an acre in Pittsboro, Mississippi.

That Dennis Murphree some several years ago, probably five or six, built a house on the tract of land which he still owned in Pittsboro, Mississippi. That this house is occupied by no person whatsoever excepting that one or two nights a year Dennis Murphree will come to Pittsboro and stay therein. During the rest of the year the shades are drawn, the grass uncut, and the premises entirely vacant.

That Dennis Murphree does not claim a homestead exemption on this property, which he would be entitled to under the laws of the State of Mississippi if this was his property and occupied as his homestead. The affiant has checked the records of the Tax Assessor of Calhoun County, Mississippi, and finds that no such claim of exemption has been made by Dennis Murphree.

That Dennis Murphree votes in Calhoun County, Mississippi.

That Dennis Murphree is not a member of any Church in or near Pittsboro, Mississippi, nor is any member of his immediate family. That Dennis Murphree was not a member of any church in or near Pittsboro at the time of his removal to Jackson, Mississippi, but the members of his family were. These members of his family were dropped from the membership roll of the church about one year after their removal to Jackson, Mississippi. The affiant believes, on information, that Dennis Murphree and his family joined the Galloway Memorial Methodist Church shortly after moving to Jackson.

The affiant further states that Dennis Murphree has no business, nor business connections of any kind in Pittsboro, Mississippi, nor any known business or connections in the [fol. 36] County of Calhoun, excepting the ownership of real estate in Calhoun City, Mississippi, and the fact that his name is carried as one of the owners of the "Calhoun Monitor," published in Calhoun City, Calhoun County, Mississippi.

That the affiant lives one and one-half miles from Pittsboro, Mississippi, on a farm, and is in the town of Pittsboro every day or so, that he is familiar with those persons living in the town of Pittsboro, that he is familiar with the business activities of the town, and that, based on his own knowledge, Dennis Murphree is not a resident of the town of Pittsboro, nor engaged in any business activity therein.

That the affiant has not heard of Dennis Murphree even being in the town of Pittsboro since the summer of the year 1943. That Dennis Murphree does, however, visit the county in all election years.

Further affiant saith not.

N. R. Lamar.

Sworn to and subscribed before me, this the 1st day of September, A. D. 1944. H. C. Davis, Circuit Clerk, Calhoun County. (Seal.)

I, H. V. Watkins, Jr., of counsel for the defendant in the above-entitled cause, certify that I have this day sent by United States mail, postage prepaid, to ~~Creekmore & Creekmore~~, Attorneys at Law, Standard Life Building, Jackson, Mississippi, and to W. E. Gore, Deposit Guaranty Bank Building, Jackson, Mississippi, Plaintiff's Attorneys, a true and correct copy of the foregoing affidavit of N. R. Lamar.

This, the 7th day of September, 1944.

H. V. Watkins, Jr.

[fol. 37]

WARRANTY DEED

STATE OF MISSISSIPPI,
County of Hinds:

For and in consideration of the sum of Twelve Hundred and Twenty-five dollars (\$1225.00), cash in hand paid, the receipt of same which is hereby acknowledged, we convey and warrant to Dennis Murphree that certain tract of land described by metes and bounds as follows:

Beginning at a point on the south line of the right of way of the Robinson Street public road, where the same is intersected by the east line of Section 6, Township 5, Range 1 east; run thence south along said section line for a distance of 556 feet; thence west along a fence line 194.6 feet; thence northerly and parallel to said Section line of 560.4 feet; thence east along the south line of said road 65.7 feet; thence south 88 degrees east along the south line of said road 129 feet to point of beginning; containing two and one-half acres and being in the east half of the east half of the east half ($E\frac{1}{2}$ of $E\frac{1}{2}$ of $E\frac{1}{2}$) of section 6, Township 5, Range 1 east situated in the County of Hinds, in the State of Mississippi.

Witness our signatures the 1st day of Nov., A. D. 1924.

E. S. Brashier, Mrs. E. S. Brashier.

(Rev. Stamps \$1.50.)

STATE OF MISSISSIPPI,
County of Hinds:

Personally appeared before me, an authority in and for the County of Hinds and the City of Jackson in said State, the within named Dr. E. S. Brashier, and his wife, Mrs. E. S. Brashier, who acknowledged that they signed and

[fol. 38] delivered the foregoing instrument on the day and year therein mentioned.

Given under my hand and official seal at Jackson, Mississippi, this 1st day of Nov., A. D. 1924.

W. J. Buck, Clerk of the Supreme Court. (Seal.)

Recording Fee	.50
Certificate	.50
Total	1.00

Filed Nov. 3, 1924, at 12:50 P. M.

Recorded Dec. 26, 1924.

W. W. Downing, Clerk, by E. D. Roberts, D. C.

Certificate of True Copy

THE STATE OF MISSISSIPPI,
Hinds County:

I, Frank T. Scott, Clerk of the Chancery Court in and for said County and State, do hereby certify that the above and foregoing is a true and correct copy of Warranty Deed as appears of record in my office, and that the same is duly recorded in Deed Book No. 160, Page 329 of Record of deeds.

Given under my hand and the seal of said Court at my office in Jackson, in said County and State, this the 24 day of August, 1944.

Frank T. Scott, Clerk, by Julie Ainsworth, D. C.
(Seal.)

[fol. 39] AFFIDAVIT OF DENNIS MURPHREE

Filed This 4 Day of Dec., 1944

STATE OF MISSISSIPPI,
County of Hinds,
City of Jackson:

Personally came before me, the undersigned authority in and for said City, County and State, Dennis Murphree, who being by me first duly sworn, makes affidavit as follows:

I was born fifty-eight years ago in the town of Pittsboro, Calhoun County, Mississippi, My ancestors, immediate and remote, lived in said county or the territory which now com-

prises said county for more than 100 years next before this date and were among the first settlers therein. The affiant's grandfather was a member of the Board of Police of Chickasaw County and was appointed and acted as a commissioner to locate the county seat when Calhoun County was created. T. M. Murphree, the father of this affiant, was born and raised in said county, went from there into the Confederate Army during the War Between the States, and after his return from the army continued to live in said county the remainder of his life, serving the people of said county for years in different capacities, among them being that of Circuit Clerk for eight years and a member of the State Legislature for two terms. When this affiant was a boy, only nineteen years of ages, he took over the publication of the Calhoun Monitor, a newspaper which for some years had been published in Pittsboro by his father, who had recently died. Since that time, until the present, affiant has owned a substantial interest, nearly one-half, in said newspaper, which has now been published continuously for more than forty-four years, but in the year 1921 was moved from Pittsboro to Calhoun City, both in Calhoun County. [fol. 40] In 1911 the people of Calhoun County elected this affiant, then a young man of only twenty-five years of age, to the Legislature of Mississippi and again elected him to the same place in 1915 and 1919.

In 1923 affiant was elected by the people of Mississippi, Lieutenant Governor, and he entered upon the discharge of his duties on January 22, 1924, and for official reasons then came from Calhoun County his actual household and residence, to Hinds County, Mississippi, for the purpose of performing the duties of his office as such Lieutenant Governor, and affiant did not thereby or thereupon elect to become an actual householder or resident of Hinds County, but intended, and did, and has ever since continued, to be a resident and citizen of Calhoun County, Mississippi. On March 18, 1927, this affiant became Governor of Mississippi by reason of the death of the then Governor, H. L. Whitfield, and he continued in that office until the 17th day of January, 1928. In the meantime, during the year 1927, affiant was a candidate for Governor.

In 1926, affiant became the State agent for the Royal Union Life Insurance Company. In order to carry on this work, it was necessary that he be centrally located as he was required to do considerable traveling over the State in

the discharge of his duties, and Jackson was centrally located and had the best transportation facilities there were in the State. For this reason and because he was then organizing his friends in preparation for becoming a candidate for Governor in 1931, affiant continued in these two endeavors until the early part of 1931, when for reasons not necessary to be here stated he decided not to be a candidate for Governor that year, but to be a candidate for Lieutenant Governor. He made the campaign for Lieutenant Governor in 1931 and was elected, taking office as such on the 19th day of January, 1932, and continued to serve in such capacity until January, 1936, when his term expired. During the year 1935, affiant was a candidate for Governor, but was defeated. Shortly after the expiration of his term as Lieutenant Governor, in 1938, he was appointed by the President as Director of the National Emergency Council for Mississippi. In order to perform the duties of this office it was necessary that he maintain his official residence in Jackson, Hinds County, Mississippi. He continued to serve as such until in the Spring of 1939, when he resigned in order to make the race for Lieutenant Governor. He was elected Lieutenant Governor for the third time and took office as such in January, 1940, and continued to serve as such until December 26, 1943, when by reason of the death of the late Governor Paul B. Johnson, affiant became Governor and served from that day until January 18, 1944.

The affiant built and furnished, ready for immediate occupancy, a house in the town of Pittsboro, in 1939, on a lot in said town, on which he was born, to which he intends to return as his permanent home. Said home consists of three bedrooms, a kitchen, a living room, a bathroom and it has a screened porch in the front and rear and has installed in it modern electrical equipment suitable for use as a home and for no other purpose. In 1942, this affiant purchased a cemetery lot in the town of Pittsboro, for the purpose of supplying himself with a place of burial.

In every campaign which this affiant has made for public office, he publicly stated, in his campaign speeches and at all other times when the question was discussed, that he was a citizen of Calhoun County.

When the homestead exemption claim was filed, this affiant was engaged in the performance of duties as a public officer, and was advised that said exemption could be claimed either in Hinds or Calhoun County, and the affiant

probably did not give the matter of claiming a homestead exemption sufficient attention, as a matter of law, but he [fol. 42] did not, in so filing said claim, intend to change his citizenship from Calhoun to Hinds County.

The affiant has registered and voted in all elections in Calhoun County, when he voted at all, ever since he reached the age of twenty-one years.

The affiant was elected by the Democratic Convention of Calhoun County, in 1944, to the State Convention.

All poll taxes and automobile privilege taxes have been assessed against this affiant, and all gasoline ration books have been issued to him, in Calhoun County. All war bonds purchased and Red Cross donations which have been made by the affiant were made as a part of the quotas of Calhoun County.

The affiant's wife pays her poll tax and registers and votes in Calhoun County and the son of the affiant pays his poll tax, registers and votes there and the affiant's married daughters voted there until the time of their marriage.

This affiant has no interest in the firm of Spencer, Murphree and Spencer and has no connection with it, except that he is a stockholder therein.

Dennis Murphree.

Sworn to and subscribed before me this December 2, 1944. Lulah Turner, Notary Public. Com. Exprs. 9-23-45. (Seal.)

[fol. 43] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE NORTHERN DISTRICT OF MISSISSIPPI

Civil Action No. 234

DENNIS MURPHREE, Plaintiff,

vs.

MISSISSIPPI PUBLISHERS CORPORATION, Defendant

JUDGMENT

This day this cause came on to be heard on the motion to dismiss of Mississippi Publishers Corporation, Defendant, and the Court having heard and considered the same and

being of the opinion that the same is well taken and should be sustained,

It is, therefore, Ordered and Adjudged, that the motion to dismiss of the defendant be and the same is hereby sustained, and plaintiff's complaint is hereby dismissed without prejudice at the cost of the plaintiff, for which let execution issue, and to all of which plaintiff excepts.

Ordered and Adjudged, this 5th day of December, 1944.

Allen Cox, District Judge.

IN UNITED STATES DISTRICT COURT

OPINION—Filed December 5, 1944

The plaintiff in this cause is a resident citizen of the Northern District of Mississippi. The defendant is a non-resident corporation which does no business in the Northern District of Mississippi; but which engages in business [fol. 44] in the Southern District of Mississippi and which in obedience to the Mississippi law has designated an agent for service of process who resides in Jackson, Mississippi in the Southern District of Mississippi. The cause of action alleged in the declaration arose in the Southern District of Mississippi. Process was served on defendant in the Southern District of Mississippi by virtue of Sec. F, of Rule 4 of the Rules of Civil Procedure.

In the Court's judgment the Rules of Civil Procedure have not in any way enlarged either the jurisdiction or venue of the District Court.

As I read the opinion of the Supreme Court of the United States in *Neirbo Co. vs. Bethlehem Corporation*—308 U. S. 167—what the Court holds is in substance that for purposes of jurisdiction the Court will still recognize the legal fiction of citizenship of a corporation in the State of its incorporation; but that for purposes of venue it will adopt the practical and realistic view that such corporations are domiciled in any District where they do business and have in accordance with the mandates of State law appointed agents for the service of process.

If this be the correct view of the holding in the *Neirbo* case it follows that under Section #113 of the Judicial Code the defendant in this case, is in that limited sense, an inhabitant of the State of Mississippi, and entitled to be sued in the District of the State where it resides.

It follows that there is not proper venue in the Northern District of Mississippi and the motion to dismiss for want of venue is sustained.

This holding is in line with *St. Louis S. W. Railroad vs. Alexander*—227 U. S. 218—and in the Court's judgment presents a clear and workable application of the Rules of [fol. 45] Civil Procedure and the rules of law as announced in the *Neirbo* and the *St. Louis S. W. Railroad* case above referred to.

This December 5, 1944.

Allen Cox (Allen Cox), District Judge.

IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed December 8, 1944

Now comes Dennis Murphree, plaintiff in the above styled cause, and pursuant to the provisions of Rule 73 of Rules of Civil Procedure for the District Courts of the United States, and gives notice of the taking by him of an appeal to the United States Circuit Court of Appeals for the Fifth Circuit in the above styled cause from the Order sustaining the motion of the defendant, Mississippi Publishing Corporation, to dismiss plaintiff's complaint and the judgment rendered thereon against him on the 5th day of December, 1944, in favor of the defendant, Mississippi Publishing Corporation, as the same appears in the minutes of said District Court.

Dated this the 6th day of December, 1944.

W. E. Gore, Henry Memorial Building, Jackson, Mississippi; Rufus Creekmore, 821 Standard Life Building, Jackson, Mississippi; H. H. Creekmore, 821 Standard Life Building, Jackson, Mississippi, Attorneys for Plaintiff.

Bond on Appeal for \$250.00 omitted in printing.

[fol. 48] IN UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENTS OF RECORD ON APPEAL—Filed
December 8, 1944

Now comes Dennis Murphree, by his attorneys, and files this his designation of those portions of the record, proceedings and evidence to be contained in the record on appeal of this cause to the United States Circuit Court of Appeals for the Fifth Circuit, and for said purpose designates the entire record, consisting of the following:

1. The complaint.
 2. Summons for defendant with return thereon showing service on B. M. Trapp.
 3. Summons for defendant with return thereon showing service on H. V. Watkins, Jr.
 4. Motion of defendant to dismiss.
 5. Affidavit of Walter G. Johnson.
 6. Affidavit of Mrs. Maryetta Bishop.
 7. Affidavit of N. R. Lamar.
 8. Copy of deed from E. S. Brashier and Mrs. E. S. Brashier to Dennis Murphree.
 9. Copy of application for homestead exemption of Dennis Murphree dated May 3, 1944.
 - [fol. 49] 10. Copy of application for homestead exemption of Dennis Murphree dated May 24, 1943.
 11. Copy of application for homestead exemption of Dennis Murphree dated May 2, 1942.
 12. Unsigned application for homestead exemption dated January 7, 1941.
 13. Affidavit of Dennis Murphree.
 14. Opinion of Judge Allen Cox including his findings of fact and conclusions of law.
 15. Notice of Appeal.
 16. Appeal Bond.
 17. Designation of contents of record on appeal.
- Dated this December 6, 1944.

W. E. Gore, Henry Memorial Building, Jackson, Mississippi. Rufus Creekmore, 821 Standard Life Building, Jackson, Mississippi. H. H. Creekmore, 821 Standard Life Building, Jackson, Mississippi, Attorneys for Plaintiff, Appellant.

A true copy of the foregoing Designation served on the defendant by mailing postage prepaid, a copy of the same to its attorneys, as follows:

[fol. 50] Watkins and Eager, Standard Life Building, Jackson, Mississippi. H. V. Watkins and Ralph B. Avery, Standard Life Building, Jackson, Mississippi.

This 6th day of December, 1944.

W. E. Gore, Henry Memorial Building, Jackson, Mississippi. Rufus Creekmore, 821 Standard Life Building, Jackson, Mississippi. H. H. Creekmore, 821 Standard Life Building, Jackson, Mississippi, Attorneys for Appellant.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER AS TO RECORD

The Court being of the opinion that the entire record, including the opinion of the Court filed therein should be sent to the United States Circuit Court of Appeals for the Fifth Circuit, sitting at New Orleans, La., in the appeal taken in this case, the Clerk of this Court is directed in connection with this appeal to transmit to the Clerk of the Circuit Court of Appeals at New Orleans the entire record in this cause.

Ordered this Dec. 8, 1944.

Allen Cox, Judge.

[fol. 51] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 52] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of April 11th, 1945

No. 11254

DENNIS MURPHREE

versus

MISSISSIPPI PUBLISHING CORPORATION

On this day this cause was called, and, after argument by Rufus Creekmore, Esq., for appellant, and W. H. Watkins, Esq., for appellee, was submitted to the Court.

[fol. 53] OPINION OF THE COURT—Filed May 7, 1945

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 11254

DENNIS MURPHREE, Appellant,

versus

MISSISSIPPI PUBLISHING CORPORATION, Appellee

Appeal from the District Court of the United States for
the Northern District of Mississippi

(May 7, 1945)

Before Sibley, Hutcheson, and Lee, Circuit Judges

LEE, Circuit Judge:

Appellant, alleging himself to be a resident citizen of Calhoun County in the Northern District of Mississippi, brought this suit in the United States District Court for said district against the appellee, a Delaware corporation duly

qualified to engage in business in Mississippi, to recover damages alleged to have resulted from a libel published [fol. 54] editorially in a newspaper of the appellee in the city of Jackson in the Southern District of Mississippi. Process was served in the Southern District upon appellee's resident agent for process by the marshal for that district. Appellee moved to dismiss, alleging that the court had no jurisdiction over the subject matter or of the person of the defendant; that the venue was improperly laid; that the process was void under the law; and that the attempted service was insufficient.

The motion was tried on affidavits from which the court below found that appellant was a resident citizen of the Northern District of Mississippi; that the appellee was engaged in business in the Southern District of Mississippi, with its only office there, and, in obedience to the laws of Mississippi, had designated an agent for service of process who resided in the city of Jackson; that the cause of action alleged arose there; and that process on appellee was served in the Southern District by virtue of Section (f) of Rule 4 of the Rules of Civil Procedure. Thereupon, the court below, interpreting the opinion in the *Neirbo* case¹ to mean that for purposes of jurisdiction the Supreme Court will still recognize the legal fiction of citizenship of a corporation in the state of its incorporation, but for purposes of venue it would adopt the practical and realistic view that such a corporation is domiciled in any district where it does business and has in accordance with the mandate of the state law appointed an agent for the service of process, concluded: " * * * it follows that under Section #113 of the Judicial Code, the defendant in this case, is in that limited sense, an inhabitant of the State of Mississippi, and entitled to be sued in the District of the State where it resides"; held "that there is not proper venue in the Northern District of Mississippi"; and dismissed the suit, without prejudice, for want of venue. This [fol. 55] appeal followed. The sole question before us for determination is whether the District Court for the Northern District of Mississippi should have entertained the suit.

Since this is a civil suit between a citizen of Mississippi and a Delaware corporation and the amount in contro-

¹ *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U. S. 165.

versy exceeds \$3,000, federal jurisdiction over the subject matter is present. Under Section 51 of the Judicial Code, 28 U. S. C. A., Sec. 112(a), where the jurisdiction is founded only on the fact that the action is between citizens of different states, venue may be laid "in the district of the residence of either the plaintiff or the defendant." When laid, as here, at the residence of the plaintiff, the process from that court directed to the marshal of the Southern District and served by him upon the resident agent for service of process of the appellee in that district, conferred upon the court jurisdiction of the person of the appellee. Rule 4(f), Federal Rules of Civil Procedure.² The *Neirbo* case indicates nothing to the contrary. In fact the Supreme Court in that case seemed to recognize that the question before it would not have been raised had the suit been brought in the district of the residence of the plaintiff or that of the defendant. In the very beginning of the opinion, Mr. Justice Frankfurter said:

"The suit was based on diversity of citizenship and was not brought 'in the district of the residence of either the plaintiff or the defendant.'"

And no language in the opinion which follows disturbed or modified the lower court's holding that "had plaintiffs been residents of the Southern District of New York, so that venue was properly laid, service of process upon the defendant would have been had by service upon its agent."³ [fol. 56] The rationale of the opinion in the *Neirbo* case is that a foreign corporation, by the appointment of an agent for the service of process in accordance with the laws of the state in which the corporation is doing business, waives the provisions of the venue statute which otherwise it would be entitled to assert; by such act it affirmatively consents to be sued in the courts in that state, state and federal. Prior to the *Neirbo* case the courts generally had held that such an appointment did not constitute a waiver by a corporation of its right to be sued

² Moore's Federal Practice, Vol. I, p. 360, et seq.; Hughes, Federal Practice and Procedure, Vol. 17, Secs. 18.992 to 18.994, incl.: *Schwarz v. Aircraft Silk Hosiery Mills*, 110 F. 2d 465; *O'Leary v. Lofton*, 3 F. R. D. 36.

³ *Neirbo v. Bethlehem Shipbuilding Co.*, 103 F. 2d 765, 770.

in the district of which it was an inhabitant; ⁴ but even when so holding, the courts recognized the right of a plaintiff in diversity of citizenship cases to subject a corporate defendant to suit in a federal court of the district of which the plaintiff was a resident.⁵

Section 113, Title 28 U. S. C. A., relied on by the court below does not conflict with but supplements Section 112(a). Under Sections 112(a) and 113, where diversity of citizenship exists and suit is not brought in the district of the residence of the plaintiff but in the district of the residence of the defendant, and the defendant resides in a state containing more than one district, and the suit is not one of a local nature, then venue must be laid in that district of the state where the defendant resides.

More troublesome, perhaps, is the question whether the court of the Northern District could obtain jurisdiction over the person of the defendant by service of process outside the district. This question relates to the power of the Supreme Court to promulgate Rule 4(f) of the Federal Rules of Civil Procedure. While the rule affects neither venue nor jurisdiction over the subject matter, it does [fol. 57] permit the court to acquire personal jurisdiction over a defendant in another district within the state in a case like the present,—a power that did not exist prior to the adoption of the rules. As was pointed out in Moore's Federal Practice, Vol. 1, page 361, "Since the Advisory Committee specifically called the attention of the Supreme Court to the question of its power to promulgate this rule, it may be safely assumed that the Supreme Court, by promulgating the rule, has concluded that it has the power."

In this court appellee contends that the consent to be sued flowing from the appointment of an agent for service of process under state law is limited by the state venue statutes and this limitation governs the venue of the federal courts in the state; and appellee argues that as the Mississippi statute in fixing venue of suits in the state courts fixes venue either in the district where the cause

⁴ See cases cited in 103 F. 2d 765.

⁵ McCormick v. Walther, 134 U. S. 41; Munter v. Weil Corset Co., 261 U. S. 276; Seaboard Rice Milling Co. v. C. R. L. & P. R. R. Co., 270 U. S. 363; Mass. Bonding & Ins. Co. v. Concrete Steel Bridge Co., 37 F. 2d 695.

of action accrued or where the defendant had its principal place of business, venue in this case was improperly laid in the District Court for the Northern District of Mississippi, since the cause of action accrued in the Southern District of Mississippi and appellee had his principal place of business in that district. What the situation might be if there were no federal statute fixing venue is not before us. It is hornbook law that where a federal statute fixes the venue of the federal courts, state laws are inapplicable. Cf. *Munter v. Weil Corset Co.*, 261 U. S. 276, 278.

Considerable space is devoted in the briefs to a consideration of the issue of fact with respect to the place of residence of the plaintiff. The finding of the court below on [fol. 58] this issue is supported by substantial evidence—evidence which has convinced us that the lower court's finding on this issue is correct.

The judgment appealed from is reversed, and the cause is remanded for proceedings in accordance with the views herein expressed.

Reversed and Remanded.

[fol. 59]

JUDGMENT

Extract from the Minutes of May 7th, 1945

No. 11254.

DENNIS MURPHREE

versus

MISSISSIPPI PUBLISHING CORPORATION

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for proceedings in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellee, Mississippi Publishing Corporation, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 60] MOTION FOR STAY OF MANDATE—Filed May 14, 1945

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH
CIRCUIT

Number: 11,254

DENNIS MURPHREE, Appellant,

VS.

MISSISSIPPI PUBLISHING CORPORATION, Appellee

APPLICATION FOR STAY OF EXECUTION AND ENFORCEMENT OF
JUDGMENT

Come the Mississippi Publishing Corporation, appellee in the above entitled case, and Maryland Casualty Company, its surety, and petition the court for a stay of execution and enforcement of the judgment rendered appellant in the above entitled case, for a period of ninety days pending application for certiorari from the Supreme Court of the United States.

The appellee tenders herewith a good and sufficient bond in the sum of One Thousand Dollars (\$1,000.00) with the Maryland Casualty Company as surety thereon, conditioned according to Section 350, U. S. C. A., Title 28.

The said appellee and its surety respectfully ask the court to make an order granting said extension, the said parties assuring the court that said application will be promptly made and filed in the Supreme Court of the United States.

(Signed) W. H. Watkins, P. H. Eager, Jr., Ralph
B. Avery, Attorneys for Appellee.

[fol. 61] ORDER STAYING MANDATE—Filed May 14th, 1945
IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH
CIRCUIT

Number: 11,254

DENNIS MURPHREE, Appellant,

vs.

MISSISSIPPI PUBLISHING CORPORATION, Appellee

ORDER STAYING ENFORCEMENT OF JUDGMENT PENDING APPLI-
CATION FOR CERTIORARI

This Day came on to be heard application of Mississippi Publishing Corporation, appellee in the above entitled case, for stay of execution and enforcement of the judgment rendered by the United States Circuit Court of Appeals in the above entitled case, pending application for certiorari from the Supreme Court of the United States, and it appearing to the court that the application is accompanied by a bond in the penal sum of One Thousand Dollars (\$1,000.00), conditioned according to law, with good and sufficient surety, to-wit, the Maryland Casualty Company, for the payment of such judgment as may be rendered, it is ordered and adjudged by the court that the execution and enforcement of such judgment against the appellee be and is hereby stayed for three months from May 7, 1945 to enable appellee to apply for and obtain a writ of certiorari from the Supreme Court of the United States.

It is ordered and adjudged by the court that the bond of said party and its surety, as aforesaid, be and is hereby approved.

Ordered and Adjudged, this the 14 day of May, 1945.

(Signed) Saml. H. Sibley, U. S. Circuit Judge.

[fol. 62] BOND FOR STAY OF MANDATE—Filed May 14, 1945
IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH
CIRCUIT

~~Number~~ Number: 11,254

DENNIS MURPHREE, Appellant,

vs.

MISSISSIPPI PUBLISHING CORPORATION, Appellee

We, Mississippi Publishing Corporation, Principal, and Maryland Casualty Company, Surety, hold ourselves well and truly bound unto the United States of America in the sum of One Thousand Dollars (\$1,000.00), for the payment of which amount we bind ourselves, our heirs and assigns.

The condition of the foregoing obligation is that:

Whereas, the above bound principal has made application for extension of the execution and enforcement of the judgment rendered against the above bound principal in the above entitled case;

Now, if said application for certiorari shall be made as stated herein and said principal shall pay and satisfy such judgment with interest and costs, if said application shall be denied, or said case affirmed by the Supreme Court of the United States, then this obligation to become void; otherwise, to remain in full force and effect.

Signed, this the — day of May, 1945.

Mississippi Publishing Corporation, by (Signed)
W. H. Watkins, P. H. Eager, Jr., Ralph B. Avery,
Attorneys. Principal. Maryland Casualty Com-
pany, by (Signed) Kate McW. Hand. Surety.

(Seal.)

Approved, this the 14 day of May, 1945.

(Signed) Saml. H. Sibley, U. S. Circuit Judge.

[fol. 64] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson and Mr. Justice Burton took no part in the consideration or decision of this application.

Endorsed on cover: Enter William H. Watkins. File No. 49937. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 234, Mississippi Publishing Corporation, Petitioner, vs. Dennis Murphree. Petition for writ of certiorari and exhibit thereto. Filed July 17, 1945. Term No. 234 O. T. 1945.

FILE COPY
Clerk - Supreme Court U.S.
F 12-123
JUL 17 1945
CHARLES ELWORE DRUMLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 234

MISSISSIPPI PUBLISHING CORPORATION,

Petitioner,

vs.

DENNIS MURPHREE

**PETITION FOR WRIT OF CERTIORARI, WITH BRIEF
THEREUPON, TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIFTH CIRCUIT.**

✓ E. C. BREWER,

✓ *Clarksdale, Mississippi;*

✓ WILLIAM H. WATKINS,

✓ P. H. EAGER, JR.,

✓ MRS. ELIZABETH HULEN,

Jackson, Mississippi,

Counsel for Petitioner.

WATKINS & EAGER,

WATKINS & AVERY,

Of Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 234

MISSISSIPPI PUBLISHING CORPORATION,

Petitioner,

vs.

DENNIS MURPHREE

PETITION FOR WRIT OF CERTIORARI

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

Jurisdictional Statement

The jurisdiction of this Honorable Court is invoked under Section 240(a) and subsection 8(a) of the Judicial Code, as amended; 28 U. S. C. A., Sections 347 and 350, and Supreme Court Rule 38, 5(b).

Summary Statement of Matters Involved

Petitioner, Mississippi Publishing Corporation (hereinafter called petitioner), by its counsel, prays that a writ of certiorari issue to review the decision (R. 52) of the United States Circuit Court of Appeals for the Fifth Circuit,

rendered May 7, 1945, in an action entitled: "Dennis Murphree, Appellant, versus Mississippi Publishing Corporation, Appellee," docket number 11,254, reversing an order (R. 43) of the District Court of the United States for the Northern District of Mississippi in favor of petitioner, which dismissed without prejudice the complaint of plaintiff, Dennis Murphree (hereinafter referred to as respondent), on motion of petitioner, on the ground that there was not proper territorial jurisdiction in the District Court of the Northern District of Mississippi.

The respondent, Dennis Murphree, on the 17th day of August, 1944, filed suit against the petitioner in the District Court of the United States for the Western Division of the Northern District of Mississippi, alleging that he was an adult resident of such district; that the respondent was a foreign corporation qualified to do business in Mississippi and was conducting business in all of the counties of the state, including the Northern District thereof; that it had appointed an agent for service of process residing in Jackson, in the Southern District of Mississippi. Respondent's complaint alleged that petitioner published certain newspapers in Jackson, Mississippi, in the Southern District thereof, having a wide circulation in the State of Mississippi, and upon the 25th day of July, 1944, published in the columns of such paper defamatory matter concerning him for which judgment was asked. The petitioner filed a motion to dismiss the complaint under Rule 12 of Rules of Civil Procedure, assigning as reasons therefor (1) that the Court was without jurisdiction over the subject matter, (2) that the Court was without jurisdiction over the person of petitioner, (3) that the venue in the case was improperly laid, (4) that insufficient and void process was issued, (5) that the attempted service of process was insufficient. From such motion, supported by affidavits, it appeared that petitioner was a foreign corporation existing under the

laws of the State of Delaware; that its principal and only place of business in the State of Mississippi was in Jackson, Hinds County, Mississippi, in the Southern District thereof; that it had never been domesticated under the laws of the State of Mississippi. That it had no office, officer, agent or servant in the Northern District of Mississippi at any time; that if the newspaper complained of published by it circulated in the Northern District of Mississippi, as was admitted, the same was mailed by the petitioner to its regular subscribers therein or sent by public transportation to news dealers in the Northern District of Mississippi who purchased such newspapers and sold the same as independent dealers to their own customers. Such newspapers were composed, published, printed, first circulated and read in the City of Jackson, in the First Judicial District of Hinds County, Mississippi, in the Southern District thereof, wherein respondent's cause of action accrued, if any he had. Process issued from the Office of the Clerk of the United States District Court in the Northern District to the Marshal of the Southern District of Mississippi and was served on petitioner's resident agent in the Southern District of Mississippi.

Upon the hearing of the motion to dismiss for the reasons assigned, it was conceded that the petitioner had not transacted any business in the Northern District of Mississippi; that such action, if any, as the respondent had against the petitioner, accrued in Jackson, in the Southern District of Mississippi and not elsewhere. The District Judge sustained the petitioner's motion to dismiss the action for lack of jurisdiction, holding that the petitioner having transacted no business in the Northern District of Mississippi could be sued in a civil action, not local, only in the Southern District of Mississippi.

Petitioner asserted that respondent was not an inhabitant or resident of the Northern District of Mississippi but that

upon the other hand, with his family, moved to Jackson, in the Southern District of Mississippi in 1924, acquired a home in which he and his family have continuously resided since such time (R. 25, 28, 34). The judgment of the United States Circuit Court of Appeals reversing the judgment of the District Court will be found (R. 56).

Questions Presented

1. Assuming that the respondent was a resident of the Northern District of Mississippi, the District Court of the Northern District of Mississippi had no jurisdiction, territorial or otherwise, over the petitioner and venue was improperly laid, because petitioner was a foreign corporation created under the laws of the State of Delaware and had never entered or transacted any business within the territorial limits of the Northern District of Mississippi, but its only office and place of business in the State of Mississippi was had at Jackson, in the Southern District of Mississippi where the cause of action accrued, if any there was.

2. Under Sections 112 and 113, U. S. C. A., Title 28, 51 and 52 Judicial Code, the United States District Court for the Northern District of Mississippi was without jurisdiction, territorial or otherwise, and the venue was improperly laid, unless the petitioner transacted business and was present within the territorial limits of the Court. Personal jurisdiction of the petitioner could not be obtained under Rule 4(f), Rules of Civil Procedure, for use in the United States District Courts unless the petitioner was present within the territorial jurisdiction of the Northern District.

3. Rule 4(f), Rules of Civil Procedure in Federal District Courts of the United States, did not enlarge or abridge

the jurisdiction or venue in the District Courts of the United States.

4. Rule 4(f), Rules of Civil Procedure for the District Courts of the United States does not authorize the issuance of process to a different district in a civil action, not of a local character, where the defendant is not a resident or inhabitant of the district and not present within the territorial limits of the district when sued alone.

5. The respondent at the time of filing the suit was a resident and inhabitant of the Southern District of Mississippi by reason whereof the District Court for the Northern District of Mississippi was without jurisdiction, territorial or otherwise, over the petitioner and the venue was improperly laid.

Reasons Relied on for the Allowance of the Writ

Reason I: The Circuit Court of Appeals has decided federal questions in conflict with applicable decisions of this Court.

(a) Before territorial jurisdiction could be acquired by the District Court of the United States for the Northern District of Mississippi over petitioner when sued alone in an action not local, over its objection, petitioner must have been doing business within the territorial limits of the Northern District of Mississippi. *Stonite Products Co. v. Melvin Lloyd Co.*, 315 U. S. 561, 567, 86 L. Ed. 1027; *Oklahoma Packing Co. v. Oklahoma Gas and Electric Co.*, 309 U. S. 4, 84 L. Ed. 537; *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U. S. 365, 84 L. Ed. 167; *Employers Reinsurance Corp. v. Bryant*, 299 U. S. 374, 81 L. Ed. 289; *Robertson v. Railroad Labor Board*, 268 U. S. 619, 69 L. Ed. 1119; *Bank of America v. Whitney Central National Bank*, 261 U. S. 171, 67 L. Ed. 594; *Peoples Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 62 L. Ed. 587; *St. L. & S. W. Ry. Co. v. Alex-*

ander; 227 U. S. 218, 51 L. Ed. 486; *Green v. Chicago, Burlington & Quincy Ry. Co.*, 205 U. S. 530, 51 L. Ed. 916; *Ex Parte Wisner*, 203 U. S. 449, 459, 51 L. Ed. 264, 267; *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237; *Toland v. Spray*, 12 Pet. 300, 9 L. Ed. 1093.

(b) The Circuit Court of Appeals has rendered a decision upon the question stated in the preceding paragraph in conflict with the decisions of other Circuit Courts of Appeal on the same matter. *Sperry Products, Inc. v. Association of American Railroads*, C. C. A. 2, 132 F. (2d) 408; *Contracting Division A. C. Horn Corp. v. New York Life Insurance Co.*, C. C. A. 2, 113 F. (2d) 864; *London v. N. & W. Ry. Co.*; 4 Cir. 111 F. (2d) 127, see cases cited therein; *Oklahoma Packing Co. v. Oklahoma Gas and Electric Co.*, C. C. A. 10, 100 Fed. (2d) 770; *McCall Co. v. Bladsworth*, 290 Fed. 365; *Sewchulis v. Lehigh Valley Coal Co.*, C. C. A. 4, 233 Fed. 422.

Reason II: The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

(a) The Circuit Court of Appeals has decided that under Rule 4(f) of the Rules of Civil Procedure for the District Courts of the United States the District Court of the Northern District of Mississippi could acquire personal jurisdiction over petitioner in an action not local when sued alone, although it was not present within the territorial jurisdiction of the Northern District of Mississippi, had never transacted business therein, but on the other hand was transacting business in the Southern District of Mississippi where the cause of action, if any, accrued, and where its agent for service of process resided.

(b) The decision of the Circuit Court of Appeals for the Fifth Circuit in holding that Rule 4(f), Rules of Civil Procedure for the District Courts of the United States

could be used to acquire personal jurisdiction over the petitioner by the United States District Court for the Northern District of Mississippi in an action not local, though the petitioner was sued alone, was not present within the territorial jurisdiction of the district, had never transacted business therein, but had its principal and only office in the State of Mississippi in the Southern District of Mississippi where the cause of action arose, if any there was, and where its agent for service of process resided, is in conflict with the decisions of other Circuit Courts of Appeal on the same matter. *Sturgeon v. Great Lakes Steel Corp.*, C. C. A., 143 F. (2d) 819; *Davis v. Ensign Bickford Co.*, 139 F. (2d) 624; *Dan Cohen Realty Co. v. National Saving & Trust Co.*, C. C. A., 125 F. (2d) 288; *Contracting Division A. C. Horn Corp. v. New York Life Insurance Co.*, C. C. A. 2, 113 F. (2d) 864; *Doyle v. Loring*, C. C. A. 6, 107 F. (2d) 337; *Sewchulis v. Lehigh Valley Coal Co.*, C. C. A. 4, 233 Fed. 422.

Reason III: Questions of jurisdiction and venue are substantial. *Harrison v. Schaffer*, 312 U. S. 579, 85 L. Ed. 1055; *Sibbach v. Wilson & Co.*, 312 U. S. 1, 85 L. Ed. 479; *Employers Reinsurance Corp. v. Bryant*, 299 U. S. 374, 81 L. Ed. 289.

Reason IV: This Court has decided a federal question in the way probably in conflict with applicable decisions of this court in that it has held under the facts in this case that respondent was an inhabitant and resident of the Northern District of Mississippi. *District of Columbia v. Henry C. Murphy*, 314 U. S. 441, 86 L. Ed. 329; *Philadelphia Railroad Co. v. McKibben*, 243 U. S. 284, 61 L. Ed. 710; *Gilbert v. David*, 235 U. S. 561, 59 L. Ed. 360.

Reason V: The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions, in that it has decided that the evidence in the case justified the conclusion that

respondent was a resident and citizen of the Northern District of Mississippi. *Bank of Cruger v. Hodge*, 189 Miss. 356, 198 So. 26; *Ritter v. Whitesides*, 179 Miss. 706, 176 So. 728; *McHenry v. State*, 119 Miss. 289, 80 So. 763; *Hattiesburg v. Mollere*, 118 Miss. 154, 79 So. 87; *Hairston v. Hairston*, 27 Miss. 704.

Reason VI: The Circuit Court of Appeals has decided an important question of local law probably in conflict with local decisions in that the court holds that the appointment of an agent for service of process by a foreign corporation, though transacting business in but one district in the state, renders it subject to suit in any Court, State or Federal, in the state. *Forman v. Mississippi Publishers Corporation*, 195 Miss. 90, 14 So. (2d) 344; *Sanford v. Dixie Construction Co.*, 157 Miss. 627, 128 So. 887.

Reason VII: The case involves an important question of federal law never before decided by this Court as to whether or not under Rule 4(f), Rules of Civil Procedure for the District Courts of the United States, personal jurisdiction may be obtained over a defendant and inhabitant of another district, when sued alone, in an action not local. The decision of the Circuit Court of Appeals in this case is contrary to applicable decisions of this Court and in conflict with the decisions of other Circuit Courts of Appeal on similar questions. It is in the public interest that the writ of certiorari in this case prayed for be granted and that this Court determine the questions presented. The decision is revolutionary in character, is supported by no other authoritative decision, will result in the deprivation of substantial rights of defendants, corporate as well as individual.

Under the decision of the Circuit Court of Appeals in this case the petitioner, although an inhabitant of the Southern District of Mississippi, and has never transacted

business of any character in the Northern District, is required to go to the inconvenience and expense of defending itself in the United States District Court some 200 miles from the location of its principal and only office in the State of Mississippi where, under the Mississippi Law, the cause of action, if any, accrued and the suit would have to be filed.

If the Rule announced for the Circuit Court of Appeals in this case is to prevail, a foreign corporation having its principal and only office in the State of Texas, in Brownsville, in the Southern District, could be required at the suit of an alleged resident of Texas, residing in the Northern District thereof, to defend a suit not of a local nature arising in the Southern District of Texas at Amarillo, Texas, approximately 900 miles distant, or a resident of the Southern District having a cause of action might move to the extreme Northern District, acquire a residence and require the defendant to appear and defend the suit in the Northern District. A corporate defendant residing at El Paso, Texas, could be required to defend a suit, not of a local nature, arising in El Paso in the Western District of Texas in Beaumont, in the Eastern District of the State of Texas, some 800 miles distant. In California a corporate defendant residing in the Southern District of the state, upon the same ground, could be required to go a thousand or 1200 miles to make its defense in an action, not of a local nature, arising in the Southern District. Other instances of inconvenience and deprivation of substantial rights might be stated. A mere statement demonstrates the necessity that this Court grant and take jurisdiction of the case.

The petitioner files herewith ten printed copies of the record as printed below together with the proceedings and opinion in the United States Circuit Court of Appeals.

Reason VIII. The decision of the United States Circuit Court of Appeals is probably directly in conflict with the

holding in the case of *Stonite Products Co. v. Melvin Lloyd Co.*, 315 U. S. 561, 86 L. Ed. 1027, wherein this Court has held that Section 113, being Section 52 of the Judicial Code, is an exception to Section 112. Section 113, Title 28, U. S. C. A., contains the following language:

"113. (Judicial Code, Section 52.) SUITS IN STATES CONTAINING MORE THAN ONE DISTRICT. When a State contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendant, directed to the marshal of any other district in which any defendant resides."

Reason IX: And for other reasons appearing to be assigned at the hearing.

WHEREFORE, petitioner prays for a writ of certiorari from this Honorable Court directed to the United States Circuit Court of Appeals, for the Fifth Circuit, commanding that Court to certify and send to this Court, for its review and determination, on a day therein named, a full and complete transcript of the record and all proceedings in the case of *Dennis Murphree v. Mississippi Publishing Corporation*, No. 11,254 on the docket of the Court, and that said judgment of said Court may be reversed and petitioner afforded appropriate relief.

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Clarksdale, Mississippi;
 WILLIAM H. WATKINS,
 P. H. EAGER, JR.,
 MRS. ELIZABETH HULEN,
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Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 234

MISSISSIPPI PUBLISHING CORPORATION,

Petitioner,

vs.

DENNIS MURPHREE

BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Judge is not officially reported but is printed in the record on Page 43, a copy thereof being made *Appendix "A"* to this brief. The opinion of the United States Circuit Court of Appeals filed May 7, 1945, is reported "Dennis Murphree vs. Mississippi Publishing Corporation, 149 Fed. (2d) 138, is printed in the record at page 52 and is made *Appendix "B"* to this brief.

Basis for Jurisdiction

The statement showing the grounds upon which jurisdiction of this Court is invoked is set forth at Page 1 of the foregoing petition and is, by reference, adopted as a part of this brief.

Statutes Involved.

(A) This case involves a construction of Paragraph (a), Section 112, U. S. C. A., Title 28 (Judicial Code, Section 51, Amended), containing the following language:

"Except as provided in sections 113 to 117 of this title, no person shall be arrested in one district for trial in another in any civil action before a district court; and, except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

As well as Section 113, U. S. C. A., Title 28, containing the following language:

"113. (Judicial Code, Section 52). SUITS IN STATES CONTAINING MORE THAN ONE DISTRICT. When a State contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides."

(B) Rule 4(f), Rules of Civil Procedure, for the District Courts of the United States, contains the following language:

"*Territorial Limits of Effective Service.* All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States

so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45."

(C) Rule 82, Rules of Civil Procedure, for the District Courts of the United States, is in the following language:

"Jurisdiction and Venue Unaffected. These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or, the venue of actions therein."

(D) Section 5319, Mississippi 1942 Code, which is made Appendix "C" to this brief.

Statement

The material facts have been set forth in the Summary Statement at pages 1, et seq., of the preceding petition, and such statement is, by reference, adopted as part of this brief.

ARGUMENT

POINT I

The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

A. The Circuit Court of Appeals, in this case, has decided that a foreign corporation with its principal and only office situated in the Southern District of Mississippi, having appointed an agent for service of process under the statutes of the State of Mississippi, may be sued in an action, not local, in the United States District Court for the Northern District of Mississippi, by a citizen and resident of such district, and that under Rule 4(f), Rules of Civil Procedure for the District Courts of the United States, process may issue to the Southern District of Mississippi,

be served upon the agent for service of process there, and personal jurisdiction of the defendant thereby obtained. This Court not only has never decided the precise question, but the decision violates all regularly established conceptions of jurisdiction and venue in the District Courts of the United States.

The Court has decided that where a foreign corporation has entered a state and appointed an agent for service of process, it may be sued in any Federal Court, regardless of whether the foreign corporation is transacting business within the district or not, when sued by a citizen and that the jurisdiction may be supplemented and acquired by Rule 4(f).

The decision of the Court grows out of a misunderstanding of the case of *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U. S. 356, 84 L. Ed. 167, 128 A. L. R. 1847, and the decision of *Oklahoma Packing Co. v. Oklahoma Gas and Electric Co.*, 309 U. S. 4, 84 L. Ed. 537. In the *Neirbo* case a resident of New Jersey brought suit in the United States District Court for the Southern District of New York against several corporate defendants; one of them, the Bethlehem, a Delaware corporation, which maintained its principal office and was engaged in business in the Southern District of New York. No question of venue was raised by either of the other defendants. The Bethlehem, however, relying upon former decisions of this Court, objected to the venue. This Court held that by the appointment of an agent for the service of process the defendant had consented to be sued in the Federal Courts of New York in the district where it was engaged in business and maintained its principal office and place of business. It must be borne in mind that the question involved in that case was as to whether or not a foreign corporation, though maintaining its principal place of business in the Southern District of

New York, could be sued therein by a non-resident of the state. The Court held that the Bethlehem, having appointed an agent for the service of process under state laws had waived the objection which it might otherwise assert against being sued in a Federal Court by a non-resident of New York, other than at its place of domicile and had consented to be sued in the Federal Court of the State of New York in a district where it maintained its principal place of business. The Court held that for practical purposes of venue the Bethlehem was a resident and inhabitant of the Southern District of New York. The opinion of the *Neirbo* case was bottomed upon the case of *Ex Parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853, where it was held that a foreign insurance company, as a condition precedent to doing business in the State of Pennsylvania, appointed an agent for service of process and consented to be sued in the state, might be sued in the Federal Court of the district in which said company transacted business by a citizen of the State of Pennsylvania. The Court held that such insurance company for purposes of venue became an inhabitant of the district in which it carried on business.

It is significant that the *Schollenberger* case, *supra*, refers to the case of *The Baltimore and Ohio Railroad Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354, where a foreign railroad corporation was transacting business and consented to be sued in the District of Columbia. Suit was brought against the foreign corporation in the District and this Court held that such foreign corporation was an inhabitant of the particular district in which it was engaged in business. There is nothing in either the *Neirbo* case or the *Oklahoma Packing Company* case, a case which is identical in principle, to justify the conclusion that by reason of Rule 4(f), Rules of Civil Procedure for the District Courts of the United States, a corporation may be sued alone in a transitory action in a district other than that in which it is engaged in business,

merely because it has appointed an agent for service of process.

The petitioner, under Section 5319, Mississippi 1942 Code, had appointed an agent for service of process. The effect given by the State Court to the statute is binding on the Federal Court. The following authorities are directly in point: *Massachusetts Bonding and Insurance Company v. Concrete Steel Bridge Co.*, 37 Fed. (2d) 695 (C. C. A. 4); *Pennsylvania Fire Insurance Co. v. Gold Issue Co.*, 243 U. S. 93, 37 S. Ct. 344, 61 L. Ed. 610; *Louisville Railway Co. v. Chatters*, 279 U. S. 320, 49 S. Ct. 329, 73 L. Ed. 711; *Maichok v. Bertha-Consumers Co.* (C. C. A. 6), 25 Fed. (2d) 257; *Smolik v. Philadelphia Iron Co.* (D. C.), 222 Fed. 148; *Mooney v. Buford Co.* (C. C. A. 7), 72 Fed. 32.

In the case of *Forman v. Mississippi Publishers Corporation*, 195 Miss. 90, 14 So. (2d) 344, the Supreme Court of Mississippi construed Section 5319, Mississippi 1942 Code, and held that it did not modify either venue or jurisdiction; that a cause of action for the publishing of a libelous publication accrued where the papers were published and first read; that suit could only be filed where the cause of action accrued, or where, as to a domestic corporation, it was domiciled, or, as to a foreign corporation, where it had its principal place of business. (See Section 1433, Mississippi 1942 Code, which is made Appendix "D" to this brief.)

B. The Circuit Court of Appeals has so construed Rule 4 (f), Rules of Civil Procedure, as to enlarge the jurisdiction of the District Court of the Northern District of Mississippi so as to enable it to entertain a suit against the petitioner, a foreign corporation, not present within the territorial jurisdiction of the Northern District of Mississippi, over a cause of action which arose in the Southern District.

The decision of the Circuit Court of Appeals is in direct conflict with the case of *Contracting Division A. C. Horn Corp. v. New York Life Insurance Company* (C. C. A. 2), 113 Fed. (2d) 864. In that case the appellant filed suit against the New York Life Insurance Company for the infringement of a patent. The suit was filed in the Southern District of New York. The appellant found that it would be necessary to join as party defendant the holder of the patent, and move the Court under Federal Rules of Civil Procedure for the District Courts of the United States to do so. It appeared, however, that the party did not reside in the Southern District of New York, but resided in the Eastern District of the State of New York. The Court held that personal jurisdiction of the cross-defendant could not be obtained since the Federal Rules did not enlarge or abridge the jurisdiction and venue in Federal Courts. The Court used the following language:

"Recognizing the necessity of having the patent owner in court, the appellant moved to join Research and A. C. Horn Company as parties plaintiff, and now attacks denial of that motion as error. It relies upon Rules 13(h), 19 (a), and 21 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c; but it fails to take note of Rule 82, which states that the rules shall not be construed to extend the jurisdiction of district courts or the venue of actions therein. Neither Research nor A. C. Horn Company is a resident of the southern district of New York, nor has either a regular and established place of business in this district. They are residents of the Eastern district of New York, and have their place of business there. This presents an insuperable obstacle to forcing them against their will into a suit in the southern district, if they be viewed as corporate entities separate and distinct from the plaintiff. *Gibbs v. Emerson Electric Mfg. Co.*, D. C. W. D. Mo., 29 F. Supp. 810; *Melekov v. Collins*, D. C. S. D. Cal., 30 F. Supp. 159."

It is very true that the foregoing case is not dealing with Rule 4(f), but the questions presented are identical since the Circuit Court of Appeals for the Second Circuit does hold that personal jurisdiction may not be obtained over a defendant not an inhabitant of the district. The court cites in support of its conclusion two opinions of District Judges dealing with Rule 4(f). In the following cases from other Circuit Courts of Appeal it is held that the Federal Rules of Civil Procedure in no manner enlarge or abridge jurisdiction or venue: *Sturgeon v. Great Lakes Steel Corp.*, C. C. A., 143 F.(2d) 819; *Davis v. Ehsign Bickford Co.*, 139 F.(2d) 624; *Dan Cohen Realty Co. v. National Savings & Trust Co.*, C. C. A., 125 F.(2d) 288; *Doyle v. Loring*, C. C. A., 107 F.(2d) 337; *Sewchulis v. Lehigh Valley Coal Co.*, C. C. A. 4, 233 Fed. 422.

The following decisions of District Courts are contrary to the Rule announced in the Circuit Court of Appeals in this case:

United States v. Skilken, 53 Fed. Supp. 14; *Herrington v. Jones*, 2 F. R. D. 108; *Brown Paper Mill Co. v. Agar Mfg. Corp.*, 1 F. R. D. 579; *Diepen v. Fernow*, D. C. Mich., 1 F. R. D. 378; *Adolph Salvatori v. Miller Music, Inc.*, 35 F. Supp. 845; *Red Top Trucking Corp. v. Seaboard Freight Lines, Inc.*, 35 F. Supp. 740; *U. S. F. & G. Co. v. John R. Alley & Co.*, 34 Fed. Supp. 604; *Cashmere Valley Bank v. Pacific Fruit & Produce Co.*, 33 Fed. Supp. 946; *Barnsdall Refining Corp. v. Birnamwood Oil Co.*, 32 Fed. Supp. 314; *Gibbs v. Emerson Electric Manufacturing Co.*, 31 Fed. Supp. 983; *Carby v. Greco*, 31 Fed. Supp. 251; *Kellar v. American Sales Book Co.*, 16 Fed. Supp. 189; *Melekov v. Collins*, 30 Fed. Supp. 159.

An outstanding District Court opinion is that of Judge Miller, Western District of Kentucky, *Carby v. Greco*, 31 Fed. Supp. 251. There suit was filed by residents of the

Western District of Kentucky against non-residents of the state for injury occurring in an automobile collision. The non-residents had appointed the Secretary of State under the laws of Kentucky, as agent for service of process but the defendants were not present and could not be found in the Western District. The Court held that jurisdiction over the person of the defendants was essential. The Court used the following language:

"The rule was stated in *Employers' Reinsurance Corp. v. Bryant*, supra, as follows: 'The defendant was not before the court, and therefore it was without jurisdiction to proceed with the suit. Counsel for the petitioner assume that the presence of the defendant was not an element of the court's jurisdiction as a federal court; but the assumption is a mistaken one. By repeated decisions in this Court it has been adjudged that the presence of the defendant in a suit in personam, such as the one now under discussion, is an essential element of the jurisdiction, of a district (formerly circuit) court as a federal court, and that in the absence of this element the court is powerless to proceed to an adjudication.' "

Addressing itself to the question presented in this case, the Court used the following language:

"Congress, of course, has the power to enlarge the jurisdiction of the District Court by statute, and make such service valid in a case of this kind. But it has not done so. The statute authorizing the adoption of the New Rules specifically refrains from doing so. Title 28 U. S. C. A. 723B. Rule 82 itself embodies this statutory restriction. In construing the rules it must be kept in mind that the method of serving a summons is procedural; the effect of such service when made is jurisdictional. *Sewchulis v. Lehigh Valley Coal Co.*, 2 Cir., 239 F. 422; *Keller v. American Sales Book Co.*, D. C., 16 F. Supp. 189. In the present case the effect of holding the service valid under Rule 4(f) is to obtain

jurisdiction over the defendant, where jurisdiction did not exist except for the rule. Such a construction is unauthorized under Rule 82.

"Defendant's motions are sustained."

C. Personal jurisdiction over the petitioner was a matter of substance and not mere procedure.

The Act of Congress dated June 19, 1934, providing for Rules of Civil Procedure for the District Courts of the United States had reference only to matters of practice and procedure, and not matters of substance. The Circuit Court of Appeals in this case has failed to distinguish between mere service of process and the effect of such service. Rule 82 expressly provides that neither venue nor jurisdiction shall be enlarged or abridged by the Rules of Civil Procedure. Rule 4(f) is one of practice and procedure and is intended to provide a method for bringing before the Court a defendant within the territorial jurisdiction of the Court unless otherwise provided by Congress, in cases where there is but one defendant. It has been expressly decided by this Court that the Rules of Civil Procedure do not dispense with matters of substance. *Carter H. Harrison v. Schaffer*, 312 U. S. 579, 85 L. Ed. 1055; *Sibbach v. Wilson & Co.*, 312 U. S. 1, 85 L. Ed. 479.

In the case of *Employers Reinsurance Corp. v. Bryant*, 299 U. S. 374, 81 L. Ed. 289 supra, it is held that the presence of the defendant within the territorial jurisdiction of the court was an essential element of the court's jurisdiction and a matter of substance, not merely one of practice or procedure. To the same effect see the case of *Robertson v. Railroad Labor Board*, 268 U. S. 619, 69 L. Ed. 1119.

The Circuit Court of Appeals placed too much emphasis upon service of process, overlooking the importance of the question of personal jurisdiction over the petitioner which was not a matter of mere procedure but one of substance.

In the case of *Sewchulis v. Lehigh Valley Coal Co.*, 233 Fed. 422 (C. C. A. 2), Judge Huff, speaking for the Court, said:

"But there is a wide difference between the method of serving a summons and the effect of such service when made. The first relates to the 'form, manner, and order of conducting and carrying on suits.' The effect of the formal act called 'service' is not a question of practice at all, but one of jurisdiction, and jurisdiction in turn must be tested by substantive law."

Note 1 to the opinion will be found in the following language:

"This is the definition of 'practice' in Bouvier's Law Dictionary, which in *Kring v. Missouri*, 107 U. S. 231, 2 Sup. Ct. 443, 27 L. Ed. 506, is said to be 'the best work of the kind in this country.'"

See the opinion of District Judge Miller in *Carby v. Greco*, supra (D. C., Ky.), 31 Fed. Supp. 251.

The Circuit Court of Appeals in deciding the present case used the following language:

"More troublesome, perhaps, is the question whether the court of the Northern District could obtain jurisdiction over the person of the defendant by service of process outside the district. This question relates to the power of the Supreme Court to promulgate Rule 4(f) of the Federal Rules of Civil Procedure. While the rule affects neither venue nor jurisdiction over the subject matter, it does permit the court to acquire personal jurisdiction over a defendant in another district within the state in a case like the present—a power that did not exist prior to the adoption of the rules. As was pointed out in Moore's Federal Practice, Vol. 1, page 361, 'Since the Advisory Committee specifically called the attention of the Supreme Court to the question of its power to promulgate this rule, it may be safely assumed that the Supreme Court, by promulgating the rule, has concluded that it has the power.'"

We submit to the Court that the mere fact that the Rules were approved with the expression of doubt by the Committee, that under Rule 4(f) process could not validly be issued to another district where one defendant was sued alone, does not justify the conclusion adopted by the court in this case. In the case of *Carby v. Greco*, supra, the District Judge used the following relevant language:

"It is well settled that, except where specifically authorized by a federal statute, the civil process of a federal District Court does not run outside the district, and that service outside of the district is void. *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093; *Munter v. Weil Corset Co.*, 261 U. S. 276, 43 S. Ct. 347, 67 L. Ed. 652; *Robertson v. Railroad Labor Board*, 268 U. S. 619, 45 S. Ct. 621, 69 L. Ed. 1119; *Employers Reinsurance Corp. v. Bryant*, 299 U. S. 374, 57 S. Ct. 273, 277, 81 L. Ed. 289."

The members of the Committee were confronted with that rule, and, therefore, entertained doubt as to whether or not if a defendant was present within the district process could be sent for service upon a resident agent in another district, unless specially authorized by Act of Congress. The necessity that process issue to some other district would only be authorized where the Court had jurisdiction and the venue was properly laid. Suppose that the petitioner had its principal office and place of business in the Northern District of Mississippi, but its agent for service of process was in the Southern District of the state. Rule 4(f) would be applicable and process might be issued and be served in the Southern District. Again, suppose that a domestic corporation, domiciled in the Northern District of Mississippi, has its agent for service of process in the Southern District, Rule 4(f) would be applicable.

Again, Congress might fix venue and jurisdiction in one district for suit, and it might be necessary to send process

to some other district for service upon the resident agent. We are attaching as *Appendix "E"* a statement contained in *Harvard Law Review*, Volume 53, Page 660, dealing with the subject matter, which is interesting.

It is a matter of substance that a defendant be sued in the district in which it is an inhabitant or resident, when sued alone. It is not a matter of substance but a matter of procedure as to where the process might be served. It is this essential distinction which the Court of Appeals has overlooked in the decision of the present case.

POINT II

The decision of the United States Circuit Court of Appeals in this case is contrary to applicable decisions of this Court construing Sections 112 and 113, U. S. C. A., Title 28.

The jurisdiction and venue of suits in District Courts of the United States is expressly provided by the Acts of Congress. Sections 112 and 113, Title 28, U. S. C. A., provide the district in which civil suits shall be brought. Paragraph (a) thereof contains the following provision:

“(a) Except as provided in sections 113 to 117 of this title, no person shall be arrested in one district for trial in another in any civil action before a district court; and, except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant.”

The foregoing is the basic general provision as to where civil suits shall be filed in the District Courts of the United States. The requirement is that the suit shall be brought in the district whereof the defendant is an inhabitant. The right to be immuned from suit except as provided in the fore-

going provision is a substantial right of the defendant. The paragraph, however, contains the following provision:

“ * * * but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.”

This provision does not enlarge the place where suit may be filed, but restricts the same.

The State of Mississippi has two districts, the Northern and the Southern, and this case comes under Section 113, U. S. C. A., Title 28, 52 Judicial Code, where the following language is used:

“113. (JUDICIAL CODE, SECTION 52.) SUITS IN STATES CONTAINING MORE THAN ONE DISTRICT. When a State contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides.”

The authorities are unanimous that the words “inhabitant” and “resident”, as used in statutes fixing Federal jurisdiction and venue, are synonymous. *In re Keasbey & Mattison Co.*, 160 U. S. 221, 16 S. Ct. 273, 40 L. Ed. 402; *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; *Boque v. Chicago*, 193 Fed. 728, 733; *Stone v. Chicago*, 195 Fed. 832; *Bicycle Stepladder Co. v. Gordon*, 57 Fed. 529; *United States v. Penelope*, 27 Fed. Cas. 486.

It necessarily appears that the petitioner was a resident and inhabitant, for the purposes of jurisdiction and venue,

of the Southern District of Mississippi and was not present within the territorial limits of the Northern District of Mississippi.

The following decisions from this Court construing Sections 112 and 113 hold that territorial jurisdiction may not be acquired by a District Court of the United States over a foreign corporation when sued in an action not local over its objection, unless such corporation is transacting business within the district. *Stonite Products Co. v. Melvin Lloyd Co.*, 315 U. S. 561, 567, 86 L. Ed. 1027; *Oklahoma Packing Co. v. Oklahoma Gas and Electric Co.*, 309 U. S. 4, 84 L. Ed. 537; *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U. S. 365, 84 L. Ed. 167; *Employers Reinsurance Corp. v. Bryant*, 299 U. S. 374, 81 L. Ed. 289; *Robertson v. Railroad Labor Board*, 268 U. S. 619, 69 L. Ed. 1119; *Bank of America v. Whitney Central National Bank*, 261 U. S. 171, 67 L. Ed. 594; *Peoples Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 62 L. Ed. 587; *St. L. & S. W. Ry. Co. v. Alexander*, 227 U. S. 218, 51 L. Ed. 486; *Green v. Chicago, Burlington & Quincy Ry. Co.*, 205 U. S. 530, 51 L. Ed. 916; *Ex parte Wisner*, 203 U. S. 449, 459, 51 L. Ed. 264, 267; *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237; *Toland v. Spray*, 12 Pet. 300, 9 L. Ed. 1093; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451; *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222, 1 Sup. Ct. Rep. 354; *Goldey v. Morning News*, 156 U. S. 518, 39 L. Ed. 517, 15 Sup. Ct. Rep. 559; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113, 23 Sup. Ct. Rep. 728; *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 47 L. Ed. 1122, 23 Sup. Ct. Rep. 807; *Peterson v. Chicago, R. I. & P. R. Co.*, 205 U. S. 364, 51 L. Ed. 84, 27 Sup. Ct. Rep. 513; *Green v. Chicago B. & Q. R. Co.*, 205 U. S. 530, 51 L. Ed. 916, 27 Sup. Ct. Rep. 595; *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. Ed. 272, 30 Sup. Ct. Rep. 125; *Herndon-Carter Co. v.*

James N. Norris Son & Co., 244 U. S. 496, 56 L. Ed. 857, 32 Sup. Ct. Rep. 550.

The decision of the Circuit Court of Appeals is in conflict with the following decisions of other Circuit Courts of Appeal on the same matter: *Sperry Products, Inc. v. Association of American Railroads* (C. C. A. 2), 132 Fed. (2d) 408; *Contracting Division A. C. Horn Corp. v. New York Life Insurance Co.* (C. C. A. 2), 113 Fed. (2d) 864; *London v. N. & W. Ry. Co.* (4 Cir.), 111 Fed. (2d) 127; see cases cited therein; *Oklahoma Packing Co. v. Oklahoma Gas and Electric Co.* (C. C. A. 10), 100 Fed. (2d) 770; *McCall Co. v. Bladsworth*, 290 Fed. 365; *Sewchulis v. Lehigh Valley Coal Co.* (C. C. A. 2), 233 Fed. 422.

Sections 112 and 113, above referred to, appeared in the Acts of Congress in 1887. They have been several times re-enacted without change in respect to the question now under discussion, including United States Code Annotated, from which it will necessarily appear that the construction given to the statutes by the Court became part of the re-enactment. *Federal Communications Commission v. Columbia Broadcasting System*, 311 U. S. 132, 85 L. Ed. 87; *Overstreet vs. North Shore Corporation*, 318 U. S. 125, 87 L. Ed. 656; *Hecht v. Malley*, 265 U. S. 144, 68 L. Ed. 949; *U. S. v. Ryan*, 284 U. S. 167, 76 L. Ed. 224; *Johnson v. Manhattan Railway Co.*, 289 U. S. 479, 77 L. Ed. 1331; *Brewster v. Gage*, 380 U. S. 327, 74 L. Ed. 457.

This decision is directly in conflict with the case of *Stonite Products Co. v. Melvin Lloyd Co.*, 315 U. S. 561, 86 L. Ed. 1027, wherein it is pointed out that Section 113, being Section 52 of the Judicial Code, is an exception to Section 112. The Court used the following language:

“The re-enactment of the Act of 1897 as Section 48, and of Rev. Stat. Section 740 as Section 52 of the Judicial Code by the Act of March 3, 1911, chap. 231, 36 Stat. at L. 1100, 1101, is not indicative of any Con-

gressional understanding that the two sections are complementary. Quite the contrary, for Section 52 appears in the Judicial Code as an exception to Section 51, the general venue provision derived from the Act of 1887, as amended. See *Camp v. Gress*, 250 U. S. 308, 315, 63 L. Ed. 997, 1002, 39 S. Ct. 478. Section 51 is, of course, not applicable to patent infringement proceedings. *General Electric Co. v. Marvel Rate Metals Co.*, 287 U. S. 430, 77 L. Ed. 408, 53 S. Ct. 202, *supra*. Since Section 48 is wholly independent of Section 51, there is an element of incongruity in attempting to supplement Section 48 by resort to Section 52, an exception to the provisions of Section 51. Cf. *Connecticut F. Ins. Co. v. Lake Transfer Corp.* (C. C. A. 2d), 74 F. (2d) 258.

“Reversed.”

The effect of the decision of the United States Circuit Court of Appeals in this case is to repeal Sections 112 and 113, U. S. C. A., Title 28, and to substitute Federal Rule 4(f) therefor.

The Circuit Court of Appeals cites no case sustaining its conclusions. The Court cites *McCormick Harvesting Machine Co. v. Walthers*, 134 U. S. 41, 33 L. Ed. 833. In that case a citizen of Nebraska sued the appellant, a foreign corporation, in the Nebraska District of the Federal Court of the State of Nebraska, where it was carrying on business. The plaintiff was a resident of the district, and the Court held that jurisdiction was had.

In the case of *Munter v. Weil Corset Co.*, 261 U. S. 276, a citizen of Connecticut sued a citizen of New York in the United States District Court of Connecticut, had the process sent to New York for service, and the Court held that there was absence of jurisdiction.

In the case of *Seaboard Rice Milling Co. v. Chicago, Rock Island & Pacific Railway Co.*, 270 U. S. 363, 70 L. Ed. 633, a citizen of Texas sued a railway corporation, a resident of Illinois, in the United States District Court of Mis-

souri. The Court held that the railway company could only be sued by a non-resident of the State of Missouri at the place of the defendant's domicile.

In the case of *Mass. Bonding and Ins. Co. v. Concrete Steel Bridge Co.* (C. C. A. 4), 37 Fed. (2d) 695, the appellant Bonding Company transacted business throughout the State of West Virginia. It was sued in the Northern District of West Virginia on a cause of action arising in such district. Process was served, however, on the State Auditor in the Southern District. The-appellant, however, was present within the territorial jurisdiction of the district where the cause of action arose, and the fact that service of process was had on its agent for service of process was necessarily proper. The Court cites *Schwarz v. Artcraft Silk Hosiery Mills*, 110 F. (2d) 465. In that case a resident of New York sued two defendants, one a foreign corporation doing business within the territorial jurisdiction of the Court in the South District of New York; the other, an individual. The Court merely held that it could not be denied that under Rule 4(f) process could issue to another district in New York for the individual defendant, the Court having obtained jurisdiction over the corporate defendant which was present within the jurisdiction of the Court.

The Court overlooked the difference between jurisdiction and venue and service of process. Jurisdiction and venue are matters of substance.

POINT III.

The respondent was not a citizen or resident of the Northern District of Mississippi.

Respondent came to Jackson in 1924 and acquired a home in which he and his family have continuously resided, and during the entire time he has been engaged in one or

more business ventures. He still owned a very small country shack in the Northern District to which he occasionally returned and spent the night. He applied for homestead exemption from taxation under the Mississippi Law and made oath that he was a resident of Jackson in the Southern District of Mississippi (R. 25, 28, 34).

On the question of jurisdiction, this Court will examine the evidence for itself. *Sartor v. Arkansas Natural Gas Corp.*, decided March 27, 1944; *Crites, Inc. v. Prudential Insurance Co.*, decided May 22, 1944. The decision of the Circuit Court of Appeals is in conflict with the following applicable decisions from this Court: *District of Columbia v. Henry C. Murphy*, 314 U. S. 441, 86 L. Ed. 329; *Philadelphia Railroad Co. v. McKibben*, 243 U. S. 284, 61 L. Ed. 710; *Gilbert v. David*, 235 U. S. 561, 59 L. Ed. 360.

The decision of the Court of Appeals upon that point is in conflict with applicable local decisions. *Bank of Cruger v. Hodge*, 189 Miss. 356, 198 So. 26; *Ritter v. Whitesides*, 179 Miss. 706, 176 So. 728; *McHenry v. State*, 119 Miss. 289, 80 So. 763; *Hattiesburg v. Mollers*, 118 Miss. 154, 79 So. 87; *Hairston v. Hairston*, 27 Miss. 704.

We respectfully state:

1. The petitioner is an inhabitant and resident of the Southern District of Mississippi, where it maintains its principal and only place of business and where its resident agent for service of process resides, and the cause of action accrued.

2. Mississippi contains two Federal districts, and under Section 113, U. S. C. A., Title 28, suit may be brought against petitioner when sued alone in a civil action not local in the Southern District of Mississippi where it is an inhabitant and resident and the cause of action accrued.

3. Rule 4(f), Rules of Civil Procedure, for use in District Courts of the United States, does not abolish the pro-

vision for territorial jurisdiction over the petitioner provided in Section 113:

4. Rule 4(f), Rules of Civil Procedure, for use in the United States District Courts, could not be used to obtain personal jurisdiction in the United States District Court for the Northern District of Mississippi, over petitioner, a foreign corporation which never transacted business at any time within the district, but is an inhabitant and resident of the Southern District of Mississippi.

5. Rule 4(f), Rules of Civil Procedure, for use in the District Courts of the United States, may not enlarge or abridge the territorial jurisdiction or venue of actions provided in Section 112 and Section 113, U. S. C. A.

6. The mere fact that the committee having in charge the formulation of Rules of Civil Procedure, for use in the District Courts of the United States, expressed doubt as to whether Rule 4(f) would permit the issuance of process from one district to be served in another unless specially authorized by Congress, affords no basis for the conclusion reached in this case, since such rule was only intended to apply where territorial jurisdiction was present and venue properly laid.

7. The committee having in charge the promulgation of the Rules of Civil Procedure was confronted with the fact that in states having more than one district the agent for service of process for a foreign corporation usually being located at the seat of the State Government, might reside in a different district from the district wherein the foreign corporation maintained its principal office and place of business, and was an inhabitant and resident and under such circumstances the foreign corporation being within the territorial limits of the district where the suit was filed, it was appropriate that under Rule 4(f) process issue

to the district wherein the agent for service of process might be served.

8. Service of process and personal jurisdiction are separate and distinct and should not be confused. Personal jurisdiction may not be obtained over a foreign corporation in a civil action when sued alone, except and unless it is present within the territorial limits of the district where the suit is filed. If it is present, however, it is immaterial whether the agent for service of process may be found in the district or not.

9. In view of the expense, inconvenience, uncertainty and material departure from usual concepts of Federal jurisdiction and venue arising out of the Rule announced by the Circuit Court of Appeals in this case, so important a question should not be left to mere infants arising from the approval of the rules by this Court. Upon the other hand, it is appropriate that the Court take jurisdiction of this case and settle this important question which has never been decided by this Court.

10. The respondent, according to the undisputed facts, was a citizen and resident of the Southern District of Mississippi where he maintained his home and transacted his business. He did not have even a fleeting intention of taking up his residence in the Northern District of Mississippi.

Respectfully submitted,

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Of Counsel.

APPENDIX "A"**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DIVISION OF THE NORTH-
ERN DISTRICT OF MISSISSIPPI****Civil Action No. 234****DENNIS MURPHREE, *Plaintiff,******vs.*****MISSISSIPPI PUBLISHERS CORPORATION, *Defendant*****Order**

This day this cause came on to be heard on the motion to dismiss of Mississippi Publishers Corporation, Defendant, and the Court having heard and considered the same and being of the opinion that the same is well taken and should be sustained,

It is, therefore, Ordered and Adjudged, that the motion to dismiss of the defendant be and the same is hereby sustained, and plaintiff's complaint is hereby dismissed without prejudice at the cost of the plaintiff, for which let execution issue, and to all of which plaintiff excepts.

Ordered and Adjudged, this 5th day of December, 1944.

ALLEN COX,
District Judge.

APPENDIX "B"

IN THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FIFTH CIRCUIT

No. 11254

DENNIS MURPHREE, *Appellant*,*versus*MISSISSIPPI PUBLISHING CORPORATION, *Appellee*Appeal from the District Court of the United States for the
Northern District of Mississippi

(May 7, 1945)

Before Sibley, Hutcheson, and Lee, Circuit Judges

LEE, Circuit Judge:

Appellant, alleging himself to be a resident citizen of Calhoun County in the Northern District of Mississippi, brought this suit in the United States District Court for said district against the appellee, a Delaware corporation duly qualified to engage in business in Mississippi, to recover damages alleged to have resulted from a libel published editorially in a newspaper of the appellee in the city of Jackson in the Southern District of Mississippi. Process was served in the Southern District upon appellee's resident agent for process by the marshal for that district. Appellee moved to dismiss, alleging that the court had no jurisdiction over the subject matter or of the person of the defendant; that the venue was improperly laid; that the process was void under the law; and that the attempted service was insufficient.

The motion was tried on affidavits from which the court below found that appellant was a resident citizen of the Northern District of Mississippi; that the appellee was engaged in business in the Southern District of Mississippi, with its only office there, and, in obedience to the laws of Mississippi, had designated an agent for service of

process who resided in the city of Jackson; that the cause of action alleged arose there; and that process on appellee was served in the Southern District by virtue of Section (f) of Rule 4 of the Rules of Civil Procedure. Thereupon, the court below, interpreting the opinion in the *Neirbo* case to mean that for purposes of jurisdiction the Supreme Court will still recognize the legal fiction of citizenship of a corporation in the state of its incorporation, but for purposes of venue it would adopt the practical and realistic view that such a corporation is domiciled in any district where it does business and has in accordance with the mandate of the state law appointed an agent for the service of process, concluded; ". . . it follows that under Section #113 of the Judicial Code, the defendant in this case, is in that limited sense, an inhabitant of the State of Mississippi, and entitled to be sued in the District of the State where it resides"; held "that there is not proper venue in the Northern District of Mississippi"; and dismissed the suit, without prejudice, for want of venue. This appeal followed. The sole question before us for determination is whether the District Court for the Northern District of Mississippi should have entertained the suit.

Since this is a civil suit between a citizen of Mississippi and a Delaware corporation and the amount in controversy exceeds \$3,000, federal jurisdiction over the subject matter is present. Under Section 51 of the Judicial Code, 28 U. S. C. A., Sec. 112(a), where the jurisdiction is founded only on the fact that the action is between citizens of different states, venue may be laid "in the district of the residence of either the plaintiff or the defendant." When laid, as here, at the residence of the plaintiff, the process from that court directed to the marshal of the Southern District and served by him upon the resident agent for service of process of the appellee in that district, conferred upon the court jurisdiction of the person of the appellee. Rule 4(f), Federal Rules of Civil Procedure. The *Neirbo* case indicates nothing to the contrary. In fact the Supreme Court in that case seemed to recognize that the question before it would not have been raised had the suit been brought in the district of the residence of the plaintiff.

or that of the defendant. In the very beginning of the opinion, Mr. Justice Frankfurter said:

“The suit was based on diversity of citizenship and was not brought ‘in the district of the residence of either the plaintiff or the defendant.’ ”

And no language in the opinion which follows disturbed or modified the lower court's holding that “had plaintiffs been residents of the Southern District of New York, so that venue was properly laid, service of process upon the defendant would have been had by service upon its agent”. The rationale of the opinion in the *Neirbo* case is that a foreign corporation, by the appointment of an agent for the service of process in accordance with the laws of the state in which the corporation is doing business, waives the provisions of the venue statute which otherwise it would be entitled to assert; by such act it affirmatively consents to be sued in the courts in that state, state and federal. Prior to the *Neirbo* case the courts generally had held that such an appointment did not constitute a waiver by a corporation of its right to be sued in the district of which it was an inhabitant; but even when so holding, the courts recognized the right of a plaintiff in diversity of citizenship cases to subject a corporate defendant to suit in a federal court of the district of which the plaintiff was a resident.

Section 113, Title 28 U. S. C. A., relied on by the Court below does not conflict with but supplements Section 112(a). Under Sections 112(a) and 113, where diversity of citizenship exists and suit is not brought in the district of the residence of the plaintiff but in the district of the residence of the defendant, and the defendant resides in a state containing more than one district, and the suit is not one of a local nature, then venue must be laid in that district of the state where the defendant resides.

More troublesome, perhaps, is the question whether the court of the Northern District could obtain jurisdiction over the person of the defendant by service of process outside the district. This question relates to the power of the Supreme Court to promulgate Rule 4(f) of the Federal Rules of Civil Procedure. While the rule affects neither venue nor jurisdiction over the subject matter,

it does permit the court to acquire personal jurisdiction over a defendant in another district within the state in a case like the present—a power that did not exist prior to the adoption of the rules. As was pointed out in Moore's Federal Practice, Vol. 1, page 361, "Since the Advisory Committee specifically called the attention of the Supreme Court to the question of its power to promulgate this rule, it may be safely assumed that the Supreme Court, by promulgating the rule, has concluded that it has the power."

In this court appellee contends that the consent to be sued flowing from the appointment of an agent for service of process under state law is limited by the state venue statutes and this limitation governs the venue of the federal courts in the state; and appellee argues that as the Mississippi statute in fixing venue of suits in the state courts fixes venue either in the district where the cause of action accrued or where the defendant had its principal place of business, venue in this case was improperly laid in the District Court for the Northern District of Mississippi, since the cause of action accrued in the Southern District of Mississippi and appellee had his principal place of business in that district. What the situation might be if there were no federal statute fixing venue is not before us. It is hornbook law that where a federal statute fixes the venue of the federal courts, state laws are inapplicable. Cf. *Munter v. Weil Corset Co.*, 261 U. S. 276, 278.

Considerable space is devoted in the briefs to a consideration of the issue of fact with respect to the place of residence of the plaintiff. The finding of the court below on this issue is supported by substantial evidence—evidence which has convinced us that the lower court's finding on this issue is correct.

The judgment appealed from is reversed, and the cause is remanded for proceedings in accordance with the views herein expressed.

Reversed and Remanded.

♦ A True copy. Teste: .

*Clerk of the United States Circuit
 Court of Appeals for the Fifth Circuit.*

APPENDIX "C"

Section 5319, Mississippi 1942 Code, contains the following language:

"Every foreign corporation doing business in the state of Mississippi; whether it has been domesticated or simply authorized to do business within the state of Mississippi, shall file a written power of attorney designating the secretary of state or in lieu thereof an agent as above provided in this section, upon whom service of process may be had in the event of any suit against said corporation; and any foreign corporation doing business in the state of Mississippi shall file such written power of attorney before it shall be domesticated or authorized to do business in this state, and the secretary of state shall be allowed such fees therefor as is (sic) herein provided for designating resident agents. Any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of this state."

APPENDIX "D"

Section 1433, Mississippi 1942 Code.

"Venue of actions, what county generally—actions against public officer to be brought in county of his residence.—Civil actions of which the circuit court has original jurisdiction shall be commenced in the county in which the defendants or any of them may be found, and if the defendant is a domestic corporation, in the county in which said corporation is domiciled, or in the county where the cause of action may occur or accrue except where otherwise provided, and except actions of trespass on land, ejectment, and actions for the statutory penalty for cutting and boxing trees and firing woods and actions for the actual value of trees cut which shall be brought in the county where

the land or some part thereof, is situated; but if the land be in two or more counties, and the defendant resides in either of them, the action shall be brought in the county of his residence, and in such cases, process may be issued against the defendant to any other county. If a citizen resident in this state shall be sued in any action, not local, out of the county of his household and residence, or if a public officer be sued in any such action, out of the county of his household and residence, although a surety or sureties, or some of the sureties, on his bond, or other joint defendant, sued with him, be found or be subject to action in such county, the venue shall be changed, on his application, before the jury is impaneled, to the county of his household and residence, whether such suit is filed before or after such officer's term of office has expired."

APPENDIX "E"

Quotation from Harvard Law Review, Volume 53, Page 660.

"But, in view of the cases insisting on the transaction of business as a prerequisite to jurisdiction, (note 38) and the distinct character of the federal judicial districts, (note 39) as well as the fact that domestic corporations, whose incidents it seems the ideal of the *Neirbo* case to impose on foreign corporations, have a residence for venue purposes only in the district where their principal place of business is located, (note 40) it is quite likely that the suability of a foreign corporation may be restricted. Should a rule be evolved confining the venue of a foreign corporation to the district of its principal place of business, there need be no fear that the beneficial effects of the *Neirbo* rule will be circumvented by appointment of an agent in another district within the state to satisfy state requirements, since Rule 4(f) of the new Federal Rules of Procedure now provides that

the process of a district court may run into other districts in the same state even in transitory actions. (note 41) And the plaintiff would not be hindered in his enjoyment of his new rights by any inconvenience in serving an agent hundreds of miles away since service of process is by an officer of the court who can be conveniently chosen for the occasion. (note 42)

"Although the decision will undoubtedly result in increasing the business of the federal courts, it is not in conflict with the policy against extending federal jurisdiction; (note 43) rather its effect is to redistribute to more appropriate and convenient forums cases already within the purview of some district court."

The following additional language is used:

"A new problem is raised; in states encompassing more than one Federal Judicial District, it will be necessary to define the extent of the consent to suit. The implication of actual acquiescence to suit in the state would seem to make a foreign corporation subject to action in any district although neither its business nor its agent is there located. In New York, at least, is denied to the foreign corporation the protection of its own venue statute. But, in view of the cases consisting of the transaction of business as a prerequisite to jurisdiction, and the distinct character of Federal Judicial District as well as the fact that domestic corporations, is incident it seems that the ordeal of the *Neirbo* case to impose on foreign corporations, have a residence for venue purposes only in the district where their principal place of business is located, it is quite likely that the suability of a foreign corporation may be restricted. Should a rule be evolved confining the venue of a foreign corporation to the district of its principal place of business, there need be no fear that the beneficial effects of the *Neirbo* rule will be circumvented by appointment of an agent in another district within the state to satisfy state requirements, since Rule 4(f) of the new Federal Rules of Civil procedure

now provides that the process of the district courts may run into other districts in the same state even in transitory actions. And the plaintiff would not be hindered in his enjoyment of his new rights by any inconvenience in serving an agent hundreds of miles away since service of process is by an officer of the court who can be conveniently chosen for the occasion."

(9282)

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 234

MISSISSIPPI PUBLISHING CORPORATION,
Petitioner,

vs.

DENNIS MURPHREE,
Respondent.

PETITIONER'S REPLY BRIEF

I

**The Opinion of the Circuit Court of Appeals in This Case
Is Contrary to the Opinion of Other Circuits**

At page 26 in original Brief for Petitioner we cited several cases from which it necessarily appears that the decision of the United States Circuit Court of Appeals in this case is contrary to the decision of other Circuits on the same matter.

Counsel has not properly distinguished *Contracting Division A. C. Horne Corp. v. New York Life Insurance Company*, 113 Fed. (2d) 864. In that case the Research Laboratories, Inc., referred to as the Research, and the Contracting Division A. C. Horne Corp. residing in the Eastern

District of the State of New York. The former was the owner of a patent of which the latter was licensee. The Contracting Division Corporation filed suit in the Southern District of New York against the New York Life Insurance Company for an infringement of the patent. The New York Life Insurance Co. wished to have the Research Corporation a party plaintiff so that it might file a counterclaim against each of said corporations.

It made application under Federal Rules of Civil Procedure 13(b), 19(a) and Rule 21 to that end. In order, however, to maintain a counterclaim against the Research Corporation, it was necessary that process issue from the Southern District of New York to the Eastern District of New York; and since neither of these corporations were incorporated or had offices in the Southern District the appellant would be unable to get process to issue on its application to require both corporations to join as plaintiff. Rule 4(f), therefore, was directly involved and the decision is in conflict with the present case.

The Court cites the case of *Gibbs v. Emerson Electric Manufacturing Co.*, D. C. Mo., 29 F. Supp. 810, where the same effort was made, and the Court based its conclusion on a construction of Rule 4(f) in connection with Rule 82. The Court used the following language:

"The statute is quite specific upon this subject. Section 109, Title 28 U. S. C., 28 U. S. C. A., Section 109, undertakes to fix the venue for suits in patent cases. Venue can only be had for the infringement of letters patent 'in the district of which the defendant is an inhabitant, or in any district in which the defendant . . . shall have committed acts of infringement and have a regular and established place of business.'

"It appears conclusively that the defendant Emerson Electric Manufacturing Company is not an inhabit-

ant of the district, and has no regular and established place of business within the district.

"Rule 4(f) of the Rules of Civil Procedure permits the service of process 'anywhere within the territorial limits of the state in which the district court is held.' This liberal rule applies only where the venue will permit.

"Rule 82 specifically provides that the rules of Civil Procedure 'shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein.'"

The Court likewise cited *Melekov v. Collins*, D. C. Calif., 30 Fed. Supp. 159, where the Court held that Rule 4(f) and Rule 82, Rules of Civil Procedure, must be construed together and that process could not issue for a defendant in another district unless territorial jurisdiction was present in the Court from which the process was to issue. The Court used the following language:

"Congress has in clear language defined the limits of the rule making power of the Court in the enabling act of June 19, 1934, c. 651, Section 1, 48 Stat. 1064, Title 28 U. S. C. A. Section 723b. This statute in its applicable part is as follows:

"The Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States . . . the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take the effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect."

"It is obvious that the only legislative authorization to establish rules to govern civil cases is such as provides solely for adjective matters in the course of litigation in controversies of a civil nature, as distinguished

from substantive ones. The latter are to remain secure to all litigants. Undoubtedly Congress can enlarge the power of the district courts to send their process for service outside of the district. As far as we are informed it has not done so in actions like the one before us, except in the restrictive way of keeping unimpaired historical substantive rights which are claimed by litigants. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359, 47 S. Ct. 400, 71 L. Ed. 684.

"In my opinion, Rule 4(f) *ex proprio vigore* could not, even if there did not exist in the Federal Rules of Civil Procedure a correlative requirement, operate to compel the nonresident defendant Vaught to submit personally to the jurisdiction of this district court in the case at bar. This rule is necessarily and expressly limited in its scope by act of Congress.

"But the limitations of the scope of Rule 4(f) are not entirely dependent upon the statute which we characterize as the enabling act, *supra*.

"Rule 82, which is as much a part of the scheme of the modernized procedure in civil actions in the federal courts as Rule 4(f), is a definite statement that the long-established and well-settled principles of substantive rights of civil litigants remain intact. Rule 82 is as follows:

"Rule 82. Jurisdiction and Venue Unaffected.

"These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein."

"In *Sewchulis v. Lehigh Valley Coal Co.*, 233 F. 422, the Second Circuit Court of Appeals aptly differentiates between the method of serving summons and the effect of such service when made, and shows that the latter activity is one which extends the jurisdiction of the District Court of the United States. Judge Hough, writing for the court, said:

"But there is a wide difference between the method of serving a summons and the effect of such service

when made. The first relates to the 'form, manner, and order of conducting and carrying on suits.' The effect of the formal act called 'service' is not a question of practice at all, but one of jurisdiction, and jurisdiction in turn must be tested by substantive law.' "

Therefore, it is apparent that the Circuit Court of Appeals for the Second Circuit in the case of *Contracting Division v. New York Life Insurance Co.* denied the motion to permit counterclaim to be filed because of the inability of the defendant to procure process on the corporations, domiciled in the Eastern District of New York. The case is directly in point and in conflict with the present decision.

II

In the Brief of Respondent's Counsel No Case Is Cited Holding That a Foreign Corporation May Be Sued in a District Other Than That in Which It Transacted Business, Whether Suit Is by a Resident or a Nonresident of the State.

In the case of *St. Louis S. W. Railway Company v. Alexander*, 227 U. S. 218, 57 L. Ed. 486, the Court announced the following rule:

"The other question as to the presence of the corporation within the jurisdiction of the court in which it was sued raises more difficulty. A long line of decisions in this court has established that in order to render a corporation amenable to service of process in a foreign jurisdiction it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof. *Lafayette Ins. Co. v. Frence*, 18 How. 404, 15 L. Ed. 451; *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222, 1 Sup. Ct. Rep. 354; *Goldey v. Morning News*, 156 U. S. 518, 39 L. Ed. 517, 15 Sup. Ct. Rep. 559; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47

L. Ed. 1113, 23 Sup. Ct. Rep. 728; *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 47 L. Ed. 1122, 23 Sup. Ct. Rep. 807; *Peterson v. Chicago, R. I. & P. R. Co.*, 205 U. S. 364, 51 L. Ed. 84, 27 Sup. Ct. Rep. 513; *Green v. Chicago, B. & Q. R. Co.*, 205 U. S. 530, 51 L. Ed. 916, 27 Sup. Ct. Rep. 595; *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. Ed. 272, 30 Sup. Ct. Rep. 125; *Herndon-Carter Co. v. James N. Norris Son & Co.*, 224 U. S. 496, 56 L. Ed. 857, 32 Sup. Ct. Rep. 550."

The foregoing case states the general rule which has uniformly prevailed in the determining of the question of venue as to foreign corporations in the Federal Courts of the United States. Other cases are cited in our original brief at page 25.

Opposing counsel dismissed the entire argument with the mere statement that all of these cases were decided prior to the adoption of Rule 4(f), Rules of Civil Procedure. Counsel do not cite a single case holding that a foreign corporation transacting business in only one district in the state may be sued either by a resident or nonresident of the state in a district other than that in which it transacts business. In the case of *Schwarz v. Artercraft Silk Hosiery Mill*, 110 F. (2d), 465. The plaintiff, a resident of the Southern District of New York, filed suit against a foreign corporation transacting business in such district and an individual resident of Pennsylvania, present and served within the district. The controversy arose over the contention of the defendant that he was fraudulently lured into the district and was not subject to process.

In the case of *Williams v. James, D. C. La. 34 Fed. Supp. 61*, suit was brought by nonresidents of the State of Louisiana in the Western Division thereof, against a nonresident of the state transacting business in the Western District and an insurance corporation transacting business throughout the entire state. Each of the defendants had appointed

an agent for service of process residing in the Eastern District and the Court held that process might issue from the Western District to the Eastern District.

In the case of *Coastal Club v. Shell Oil Company*, 45 Fed. Supp. 850, the suit was brought in the Western District of Louisiana by a resident of the district against the Shell Oil Company, a foreign corporation, actually engaged in drilling oil wells in the Western District of the state within the jurisdiction of the Court. Its agent for service of process, however, resided in the Eastern District and the Court held that properly that process might issue to the Eastern District for service. Counsel are constantly confusing the question of the place of service with venue. The rule is that the Court having jurisdiction and the venue being properly laid under Rule 4(f) process may issue to any part of the state for service.

Counsel cite the case of *McCormick v. Walthers*, 134 U. S. 41, 33 L. Ed. 833. We distinguished this case in our original Brief at page 27, reference to which is made.

We likewise distinguished the case of *Munter v. Weil Co.*, 261 U. S. 276 at page 27, and at the same point we distinguished the case of *Seaboard Rice Milling Co. v. Chicago, Rock Island & Pacific Railway Co.*, 270 U. S. 363.

At page 28 we distinguished the case of *Mass. Bonding and Insurance Co. v. Concrete Steel Bridge Co.*, 37 Fed. (2d) 696.

In the case of *Andrews v. Joseph Cohen & Sons*, 45 F. Supp. 732, it is held that a foreign corporation could only be sued in the Southern District of Texas where it was transacting business and the wrong complained of took place. Counsel are very unfortunate in their citation in the case of *Richard v. Franklin County Distilling Co.*, 38 Fed. Supp. 513. In that case a resident of the State of Kentucky filed suit in the Western District thereof against a foreign corporation doing business only in the Eastern

District of Kentucky. The District Judge held that since the foreign corporation was not doing business within the Western District of Kentucky process could not issue under Rule 4(f) to the Eastern District for service on the defendant. In the opinion delivered by Judge Miller will be found a learned and interesting discussion of the question wherein the Court held that Rule 4(f) must be held in connection with Rule 82, and that process may not issue to another district for a foreign corporation not residing or an inhabitant of the district in which the suit is brought. In view, however, of the importance of the question the Court states that the matter should be authoritatively passed upon, using the following language:

"Plaintiff therefore contends that Rule 4(f) is a statutory enactment and therefore supercedes the earlier rule established by the case above referred to. I agree that Rule 4(f) has the effect of a statutory enactment, but this also means that Rule 82 likewise, has the effect of a statutory enactment. Accordingly, the question still remains for decision as to the combined effect of both Rules 4(f) and 82. This question will no doubt repeat itself often and it is hoped that it will be ruled upon by one of the higher courts in the near future, as it should be applied uniformly throughout the federal courts. In the absence of any such ruling at the present time, and in view of conflicting decisions from District Courts, I see no reason to depart from my former holding in *Carby v. Greco*, supra."

Counsel cite the case of *O'Leary v. Lofton*, D. C. N. Y., 3 F. R. D. 36. In that case a resident of the Eastern District of New York filed suit in such district against a foreign corporation organized under the laws of Florida doing business in the Southern District. The District Judge conceded that this Court had never passed upon the question; that no Circuit Court of Appeals had done so. The District Judge further conceded that opinions of other District

Courts outside of New York were to the contrary; that the decision of the District Judges in New York was divided, but held that since it was only a ten-minute ride from the Eastern District to the Southern District, on the streetcar, that the matter was one of procedure and not of substance. The decision in this case emphasizes the importance that this Court take jurisdiction and settle the question.

We respectfully submit that the rule was most clearly and accurately stated by Judge Charles E. Clark, of the Second Circuit, who was reporter for the rules having in charge the adoption thereof. His statement found in Moore's Federal Practice. Supplement to page 361 is in the following language:

"Dean, now Circuit Judge, Charles E. Clark, Reporter for the Supreme Court's Advisory Committee, said in reference to Rule 4(f): 'The question has been raised whether this is not a substantive change, one affecting jurisdiction and venue. I might say on that, it is our theory that definitely it is not. This is not a matter of either the jurisdiction of the court, what matters the court shall hear and decide, or of the venue, which is the place where certain kinds of action shall be tried. This affects neither one of those points. It simply says that in cases where the district court already has jurisdiction and venue its process may reach as far as the confines of that state itself. In other words, that is why we consider it procedural. It is simply allowing people to be brought before the court within the entire state and not merely within one district.' Proceedings before the Cleveland Institute on the Federal Rules (1938 205-206)."

III

The Petitioner Is a Resident and Inhabitant of the Southern District of Mississippi

Section 112, 28 U. S. C. A., paragraph (a) provides that no civil suit shall be brought in any district court against

any person by any original process or proceeding in any other district than that whereof he is an inhabitant. This section deals primarily with states having but one judicial district. In states where there are two judicial districts, Section 113 contains the following provision:

“When a state contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such state, must be brought in the district where he resides;”

It is perfectly obvious that the word “inhabitant” in Section 112 and the word “resident” in Section 113 are synonymous. It is very true that Section 112 contains the following provision:

“but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the resident of either the plaintiff or the defendant.”

And it may be conceded that the foregoing provision is applicable to Section 113. This provision, however, does not enlarge, but restricts the jurisdiction of the Court.

In the case of *Shaw v. Quincy Mining Company*, 145 U. S. 444, the Court used the following language:

“The whole purport and effect of that Act was not to enlarge, but to restrict and distribute jurisdiction.”

The same rule is announced in *McCormick v. Walthers*, 134 U. S. 41. However, if the suit should be brought by a citizen of the state against a foreign corporation or brought by a nonresident of the state against a foreign corporation the same must, of necessity, be filed in the district where the foreign corporation transacts its business. However, as was held in the case of *Neirbo v. Bethlehem Shipbuilding Corp.* and the *Oklahoma Packing Company v. Oklahoma Gas and Electric Company* where a corporation en-

ters into a state and appoints an agent for service of process consenting that it may be sued in the state it becomes from all purposes of venue an inhabitant and resident of the district in which it transacts business. In the *Neirbo* case the plaintiff was a nonresident of the state as was the Bethlehem Shipbuilding Corp., but the latter by appointing an agent for service of process had waived its right to be sued by a nonresident only at the place of incorporation and had consented to be sued before any court, state or federal, having jurisdiction where the venue was properly laid.

In the *Neirbo* case the plaintiff could only have sued the foreign corporation in a district where it was transacting business and if the suit had been brought by a resident of the state, the rule would have been the same.

For all practical purposes the Petitioner is a resident and an inhabitant of the Southern District of Mississippi. It is still a Delaware Corporation with the right to remove a case to the Federal Court where the requisite facts exist, but as to the question of venue it has waived its right to be sued by a nonresident only in the state of its creation and may be sued in the district, and only in the district, where it transacts business.

IV

We Do Not Question the Validity of the Rules of Civil Procedure for Use in the District Courts of the United States

We do not question the validity of the Rules, but we submit that the rules should be construed together as a harmonious whole, and no rule should be construed as to violate the Act of Congress authorizing the adoption of the rule. The construction of Rule 4(f) adopted by the Court

of Appeals in this case fails to take into account Rule 82, and authorizes the Respondent, assuming that he is a citizen of the state, to maintain a suit against a foreign corporation not transacting business in the district. It is our contention that the rule may not legally have any such effect. Rule 82 shall not enlarge or diminish jurisdiction or venue. This means that the rule shall not enlarge jurisdiction over the person; that is to say, shall not enlarge territorial jurisdiction over the petitioner. The manner of obtaining service and the place of service is a matter of procedure, but the Petitioner has the right to be sued in the manner and at the place provided by federal statutes. It has not waived this right. This right is a matter of substance and not merely one of procedure. It is a right which the Petitioner may waive, but which the Petitioner has not waived. It is insisting upon this substantial right.

In the case of *Robertson v. Railroad Labor Board*, 268 U. S. 619, 69 L. Ed. 1119 this Court laid great emphasis upon the importance that suit be filed at the place provided by the Act of Congress. The Court used the following language:

"We are of the opinion that by the phrase 'any district court of the United States' Congress meant any such court 'of competent jurisdiction.' The phrase 'any court' is frequently used in the Federal statutes, and has been interpreted under similar circumstances as meaning 'any court of competent jurisdiction.' By the general rule the jurisdiction of a district court in personam has been limited to the district of which the defendant is an inhabitant, or in which he can be found. It would be an extraordinary thing if, while guarding so carefully all departure from the general rule, Congress had conferred the exceptional power here invoked upon a board whose functions are purely advisory (*Pennsylvania R. Co. v. United States R. Labor Bd.*, 261 U. S. 72, 67 L. Ed. 536, 43 Sup. Ct. Rep. 278;

Pennsylvania R. System v. Pennsylvania R. Co., March 2, 1925 (267 U. S. 203, ante; 574, 45 Sup. Ct. Rep. 307), and which enters the district court, not to enforce a substantive right, but in an auxiliary proceeding to secure evidence from one who may be a stranger to the matter with which the board is dealing."

The Petitioner in entering the State of Mississippi for the purpose of transacting business in the Southern District thereof, appointed an agent for service of process. It surrendered a valuable right, the right to be sued by a nonresident in the state of its creation, but it only agreed that suit might be filed for some court having jurisdiction where the venue was properly laid. In the federal court that suit must be brought in a district of which it is a resident and inhabitant; that is to say, in the Southern District of Mississippi. In a state court it may be sued in the county where it has its principal office and place of business and in the county where the cause of action accrued.

Forman v. Mississippi Publishers Corp., 14 So. 2d, 344; *Sanford v. Dixie Construction Co.*, 137 Miss. 627; *Tri-State Transit Co. v. Mundy*, 194 Miss. 714. In the state court it may be sued at two places, and if the suit is brought in a county other than that in which the agent for service of process resides such process may be issued to the proper county. Neither venue nor jurisdiction turn upon the place of service of process as counsel so often insist.

V

The Respondent Was a Resident of the Southern District of Mississippi

Counsel cite *Hallenbeck v. Leimert*, 294 U. S. 699, 79 L. Ed. 1236. This case has no possible connection and throws no light upon this case.

The Petitioner had no right to appeal and was not required to appeal from the conclusion of the District Judge that the plaintiff resides in the Northern District of Mississippi. The judgment of the court, the thing appealed from, was in favor of the Petitioner and it could not appeal therefrom. It was not required to note any exception to any statement made by the District Judge.

We respectfully submit that the writ should be granted, the case determined by this Court, the judgment of the Court of Appeals reversed, and the Judgment of the District Court affirmed.

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Office of the United States
 NOV 21 1915
 CHARLES E. MORE BROOKLYN

No. 234

Petitioner,

U.S.

Respondent

BRIEF FOR PETITIONER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 234

MISSISSIPPI PUBLISHING CORPORATION,

vs.

Petitioner,

DENNIS MURPHREE,

Respondent

BRIEF FOR PETITIONER

I

Opinions Below

The opinion of the District Judge is not officially reported but is printed in the record on page 33, a copy thereof being made *Appendix "A"* to this brief. The opinion of the United States Circuit Court of Appeals, filed May 7, 1945, is reported "*Dennis Murphree v. Mississippi Publishing Corporation*, 5 Cir., 149 Fed. (2d) 138," is printed in the record at page 37, and is made *Appendix "B"* to this brief.

II

Jurisdictional Statement

The jurisdiction of this Honorable Court is invoked under Section 240(a) and subsection 8(a) of the Judicial Code, as

amended, 28 U. S. C. A., Sections 347 and 350, and Supreme Court Rule 38, 5(b).

Grounds of Jurisdiction

1. The Circuit Court of Appeals has decided an important question in a way in conflict with appellate decisions of this settled by this Court.

2. The Circuit Court of Appeals has decided a federal question in a way in conflict with appellate decisions of this Court.

3. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

4. The Circuit Court of Appeals has rendered a decision in conflict with the decisions of other Circuit Courts of Appeal on the same matter.

5. The Circuit Court of Appeals has decided an important question of local law in a way in conflict with applicable local decisions.

III

Statement of Case

This case is before the Court on Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

The respondent, Dennis Murphree, on the 17th day of August, 1944, filed suit against the petitioner in the District Court of the United States for the Western Division of the Northern District of Mississippi, alleging that he was an adult resident of such district; that the respondent was a foreign corporation qualified to do business in Mississippi and was conducting business in all of the counties of the state, including the Northern District thereof; that it had appointed an agent for service of process residing in Jack-

son, in the Southern District of Mississippi. Respondent's complaint alleged that petitioner published certain newspapers in Jackson, Mississippi, in the Southern District thereof, having a wide circulation in the State of Mississippi, and upon the 25th day of July, 1944, published in the columns of such paper defamatory matter concerning him for which judgment was asked. The petitioner filed a motion to dismiss the complaint under Rule 12 of Rules of Civil Procedure, assigning as reasons therefor (1) that the Court was without jurisdiction over the subject matter, (2) that the Court was without jurisdiction over the person of petitioner, (3) that the venue in the case was improperly laid, (4) that insufficient and void process was issued, (5) that the attempted service of process was insufficient. From such motion, supported by affidavits, it appeared that petitioner was a foreign corporation existing under the laws of the State of Delaware; that its principal and only place of business in the State of Mississippi was in Jackson, Hinds County, Mississippi, in the Southern District thereof; that it had never been domesticated under the laws of the State of Mississippi. That it had no office, officer, agent or servant in the Northern District of Mississippi at any time; that if the newspaper complained of published by it circulated in the Northern District of Mississippi, as was admitted, the same was mailed by the petitioner to its regular subscribers therein or sent by public transportation to news dealers in the Northern District of Mississippi who purchased such newspapers and sold the same as independent dealers to their own customers. Such newspapers were composed, published, printed, first circulated and read in the City of Jackson, in the First Judicial District of Hinds County, Mississippi, in the Southern District thereof, wherein respondent's cause of action accrued, if any he had. Process issued from the Office of the Clerk of the United States Dis-

district Court in the Northern District to the Marshal of the Southern District of Mississippi and was served on petitioner's resident agent in the Southern District of Mississippi.

Petitioner also asserted that respondent was not an inhabitant or resident of the Northern District of Mississippi, but that, on the other hand, he, with his family, moved to Jackson in the Southern District of Mississippi in 1925, acquired a home in which he and his family has continuously resided since such time.

Upon presentation of the motion to dismiss it was conceded that the petitioner had not transacted any business in the Northern District of Mississippi; that such action, if any, as the respondent had against the petitioner accrued in Jackson, in the Southern District of Mississippi and not elsewhere. The District Judge sustained the petitioner's motion to dismiss the action for lack of jurisdiction, holding that the petitioner, a foreign corporation, having transacted no business in the Northern District of Mississippi, could be sued in a civil action, not local, only in the Southern District of Mississippi, and, therefore, the Court had no jurisdiction over the petitioner.

An appeal was taken by respondent to the United States Circuit Court of Appeals for the Fifth Circuit, which Court, upon May 7, 1945, reversed the judgment of the District Court, by opinion reported, *Dennis Murphree v. Mississippi Publishing Corporation*, 149 Fed. (2d) 138, is printed in the record at page 37, and is made *Appendix "B"* to this brief.

This Court granted Certiorari.

IV

Errors Relied On for Reversal

The petitioner assigns and relies upon the following errors for reversal of this case:

1. The United States Circuit Court of Appeals committed error in holding that the respondent, even if a resident of the Northern District of Mississippi, could maintain this action against the petitioner, a foreign corporation, only transacting business in the Southern District of Mississippi where its agent for service of process resided.

2. The Circuit Court of Appeals committed error in holding that the District Court of the United States for the Northern District of Mississippi had jurisdiction over the person of the petitioner.

3. The United States Circuit Court of Appeals committed error in holding that Rule 4(f) of Rules of Civil Procedure of the District Courts of the United States conferred personal jurisdiction on the Court over this petitioner.

4. Since the petitioner, a foreign corporation, had not transacted business of any character in the Northern District of Mississippi, the Circuit Court of Appeals committed error in holding that under Rule 4(f), Rules of Civil Procedure of the District Courts of the United States process might issue, to the Marshal of the Southern District of Mississippi for service on the petitioner.

5. The Circuit Court of Appeals committed error in holding that Rule 4(f), Rules of Civil Procedure of the District Courts of the United States might be construed and enforced to extend the jurisdiction of the District

Court of the United States for the Northern District of Mississippi.

6. The United States Circuit Court of Appeals committed error in holding that the petitioner, by the appointment of an agent for service of process, consented that it might be sued in the United States District Court for the Northern District of Mississippi although it had never transacted business of any character in such district.

7. The United States Circuit Court of Appeals committed error in holding that the respondent was a resident or citizen of the Northern District of Mississippi.

V

Statutes Involved

(A) This case involves a construction of Paragraph (a), Section 112, U. S. C. A., Title 28 (Judicial Code, Section 51, amended), containing the following language:

“Except as provided in sections 113-117 of this title, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in sections 113-118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; except that suit by a stockholder on behalf of a corporation may be brought in any district in which suit against the defendant or defendants in said stockholders' action, other than said corporation, might have been brought by such corporation and process in such cases may be served upon such corporation in any district wherein such corporation resides or may be found. Mar. 3, 1911, c. 231, Section 51, 36 Stat. 1101;

Sept. 19, 1922, c. 345, 42 Stat. 849; Mar. 4, 1925, c. 526, Section 1, 43 Stat. 1264; Apr. 16, 1936, c. 230, 49 Stat. 1213."

As well as Section 113, U. S. C. A., Title 28, containing the following language:

"113. (Judicial Code, Section 52). Suits in States Containing More Than One District. When a State contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides."

(B) Rule 4(f), Rules of Civil Procedure, for the District Courts of the United States, contains the following language:

"TERRITORIAL LIMITS OF EFFECTIVE SERVICE. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45."

(C) Rule 82, Rules of Civil Procedure, for the District Courts of the United States, is in the following language:

"JURISDICTION AND VENUE UNAFFECTED. These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein."

(D) Section 5319, Mississippi 1942 Code, which is made Appendix C to this Brief.

VI

Summary of Points

POINT I

The United States District Court for the Northern District of Mississippi was without jurisdiction of this case and the District Judge correctly sustained petitioner's motion to dismiss. The Circuit Court of Appeals has decided a Federal question in a way in conflict with applicable decisions of this Court and in conflict with the decisions of other Circuit Courts of Appeal on the same matter.

Eastman Kodak Co. v. Southern Photo Materials Co.,
273 U. S. 359, 47 S. Ct. 400, 71 L. Ed. 684;

Illinois Central R. Co. v. Adams, 180 U. S. 28, 21 S. Ct.
251, 45 L. Ed. 410;

Re Indiana Transp. Co., 244 U. S. 456, 37 S. Ct. 717, 61
L. Ed. 1253;

Erickson v. United States, 264 U. S. 246, 44 S. Ct. 310,
68 L. Ed. 661;

United States v. Arredondo, 6 Pet. 691, 709, 8 L. Ed. 547;

Lessee of Grignon v. Astor; 2 How. 319, 338, 11 L. Ed.
283, 290;

Sections 112 and 113, Title 28, U. S. C. A.;

Ex Parte Shaw, 145 U. S. 444, 36 L. Ed. 768, 771;

Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S.
165, 84 L. Ed. 167;

Stonite Products Co. v. Melvin Lloyd Co., 315 U. S. 561,
86 L. Ed. 1026;

The Galveston, Harrisburg & San Antonio R. Co. v.
Victor Gonzalez, 151 U. S. 496, 38 L. Ed. 248;

St. L. S. W. R. Co. v. Alexander, 227 U. S. 218, 57 L. Ed.
486, 488;

Green v. C. B. & Q. Ry. Co., 205 U. S. 530, 51 L. Ed. 916;
Bank of America v. Whitney Central Natl. Bank, 261
 U. S. 171, 67 L. Ed. 594, 596;

Peoples Tobacco Co. v. American Tobacco Co., 246 U. S.
 79, 62 L. Ed. 587;

Green v. C. B. & Q. Ry. Co., 205 U. S. 530, 51 L. Ed. 916;

Lafayette Ins. Co. v. French, 18 How. 404, 15 L. Ed. 451;

St. Clair v. Cox, 106 U. S. 350, 27 L. Ed. 222;

Goldey v. Morning News, 156 U. S. 518, 39 L. Ed. 517;

Conley v. Mathieson Alkali Works, 190 U. S. 406, 47
 L. Ed. 1113;

Geer v. Mathieson Alkali Works, 190 U. S. 428, 47 L. Ed.
 1122;

Peterson v. Chicago, R. I. & P. R. Co., 205 U. S. 364,
 51 L. Ed. 841;

Mechanical Appliance Co. v. Gastleman, 215 U. S. 437,
 54 L. Ed. 272;

*Sperry Products, Inc. v. Association of American Rail-
 roads*, 2 Cir., 132 Fed. (2d) 408;

London v. N. & W. Ry. Co., 4 Cir., 111 Fed. (2d) 127;

McCall Co. v. Bladsworth, 290 Fed. 365, 2 Cir.;

Sewchulis v. Lehigh Valley Coal Co., 2 Cir., 233 Fed.
 422;

Mississippi Code 1942, Section 5319, Appendix "C";

Forman v. Mississippi Publishers Corporation, 195
 Miss. 90, 14 So. (2d) 344;

Mississippi Code 1942, Section 1433, Appendix "D";

Guaranty Trust Co. v. Blodgett, 287 U. S. 509, 77 L. Ed.
 463;

Midland Realty Co. v. Kansas City P. & L. Co., 300
 U. S. 109, 81 L. Ed. 540;

Schuylkill Trust Co. v. Pennsylvania, 302 U. S. 506, 82
 L. Ed. 392;

Bacon v. Martin, 305 U. S. 380, 83 L. Ed. 233;

Joseph Dixon Crucible Co. v. Paul, 5 Cir., 167 Fed. 784;
Turner v. Board of Trade (Cert. denied, 245 U. S. 667,
 62 L. Ed. 538), 7 Cir., 244 Fed. 108;

Waterman v. Canal Bank & Tr. Co., 5 Cir., 186 Fed. 71
 (Cert. Denied, 220 U. S. 621, 55 L. Ed. 613);

Gregg Dyeing Co. v. Query, 286 U. S. 472, 76 L. Ed.
 1232;

Gatewood v. State of North Carolina, 203 U. S. 531, 51
 L. Ed. 305;

Green v. Frazier, 253 U. S. 233, 64 L. Ed. 878;

St. Mary's Petroleum Co. v. West Virginia, 203 U. S.
 183, 27 S. Ct. 132, 51 L. Ed. 144;

Neirbo v. Bethlehem Shipbuilding Corp., 308 U. S. 165,
 84 L. Ed. 167, 128 A. L. R. 1437;

Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.,
 309 U. S. 4, 84 L. Ed. 537;

Ex Parte Schollenberger, 96 U. S. 369, 24 L. Ed. 853;

Baltimore & Ohio R. Co. v. Harris, 12 Wall. 65, 20
 L. Ed. 354;

Bagdon v. Philadelphia & R. Coal & I. Co., 217 N. Y.
 432, 111 N. E. 1075, LRA 1916F, 407 Ann. Cas.
 1918A, 389;

Shaw v. Quincy Mining Co., 145 U. S. 444, 36 L. Ed. 768;

Schwarz v. Artcraft Silk Hosiery Mills, 2 Cir., 110 F.
 2d 465, 467;

Moss v. Atlantic Coast Line R. Co., 2 Cir., 149 Fed. 2d;
 701;

Thomas v. South Butte Mining Co., 9 Cir., 230 Fed.
 968, 969;

Electric Switch Co. v. United States Gauge Co., 7 Cir.,
 129 Fed. (2d) 166;

Sewchulis v. Lehigh Valley Coal Co., 2 Cir., 233 Fed.
 422;

Sanford v. Dixie Const. Co., 157 Miss. 626, 128 So. 887;

Tri-State Transit Company v. Mondy, 194 Miss. 714,
12 So. 2d 920;

Forman v. Mississippi Publishers Corp., 195 Miss. 90,
14 So. 2d 344;—

Mississippi Code 1942, Section 5319, Appendix "C";

Lehigh Valley Coal Co. v. Yensavage, 2 Cir., 218 Fed.
547;

Sections 109, 110, 112, 113, 114, 116, Title 28, U. S. C. A.;
Seaman Act, 46 U. S. C. A. 688;

15 U. S. C. A., Sec. 22;

49 U. S. C. A. Sec. 321, par. (c).

POINT II

The Circuit Court of Appeals committed error in deciding that under Rule 4(f) personal jurisdiction might be obtained over the petitioner in a transitory action filed in the United States District Court for the Northern District of Mississippi, although the petitioner was not present in the District. In this respect the Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court. The decision of the Circuit Court of Appeals is contrary to that of other Circuits and if Rule 4(f) of Rules of Civil Procedure was correctly construed by the Circuit Court of Appeals in this case, then such rule violates the Act of Congress of June 19, 1934 authorizing this Court to prescribe such rules as well as the order of this Court of June 3, 1935 appointing an advisory committee for such purpose.

Rule 4(f), Rules of Civil Procedure;

Rule 82, Rules of Civil Procedure;

Contracting Division A. C. Horne Corp. v. New York Life Ins. Co., 2 Cir., 113 Fed. (2d) 864;

Gibbs v. Emerson Elec. Mfg. Co. (D. C. Mo.), 29 F. Supp. 810;

- Melekov v. Collins* (D. C. Calif.), 30 Fed. Supp. 159;
 Moore's Federal Practice, Supplement to page 361;
O'Brien v. Richtarsic (D. C. N. Y.), 2 F. R. D., 42;
United States ex rel. v. Commanding Officer (D. C. N. Y.), 3 F. R. D., 360;
United States v. Skilken, 53 Fed. Supp. 14;
Herrington v. Jones, 2 F. R. D., 108;
Brown Paper Mill Co. v. Agar Mfg. Corp., 1 F. R. D. 579;
Diepen v. Fernow (D. C. Mich.), 1 F. R. D. 378;
Adolph Salvatori v. Miller Music, Inc., 35 F. Supp. 845;
Red Top Trucking Corp. v. Seaboard Freight Lines, Inc., 35 F. Supp. 740;
U. S. F. & G. Co. v. John R. Alley & Co., 34 Fed. Supp. 604;
Cashmere Valley Bank v. Pacific Fruit & Produce Co., 33 Fed. Supp. 946;
Barnsdall Refining Corp. v. Birnamwood Oil Co., 32 Fed. Supp. 314;
Gibbs v. Emerson Elec. Mfg. Co., 31 Fed. Supp. 983;
Carby v. Greco, 31 Fed. Supp. 251;
Keller v. American Sales Book Co., 16 Fed. Supp. 189;
Melekov v. Collins, 30 Fed. Supp. 159;
Richard v. Franklin County Distilling Co. (D. C. Ky.), 38 F. Supp. 513, 514;
Toland v. Sprague, 12 Pet. 300, 9 L. Ed. 1093;
Munter v. Weil Corset Co., 261 U. S. 276, 43 S. Ct. 347, 67 L. Ed. 652;
Robertson v. Railroad Labor Board, 268 U. S. 619, 45 S. Ct. 621, 69 L. Ed. 1119;
Employers Reinsurance Corp. v. Bryant, 299 U. S. 374, 67 S. Ct. 273, 277, 81 L. Ed. 289;
Venner v. Great Northern R. Co., 209 U. S. 24, 52 L. Ed. 666;

United States v. Alaska Packers Assn. (C. C. A. D. C.),
30 Fed. (2d) 564;
Sibbach v. Wilson & Co., 312 U. S. 1, 61 S. Ct. 422, 85
L. Ed. 479;
Richard v. Franklin County Dist. Co. (D. C. Ky.), 38
F. Supp. 513;
Sections 112, 113, Title 28, U. S. C. A.;
Rule 82, Rules of Civil Procedure; Rule 4(f);
United States v. Sherwood, 312 U. S. 584, 85 L. Ed.
1058, 1063;
Holiday v. Johnston, 313 U. S. 342, 85 L. Ed. 1392, 1398;
Eastman Kodak Co. v. Southern Photo Materials Co.,
273 U. S. 359, 47 Sup. Ct. 400, 71 L. Ed. 684;
Robertson v. Railroad Labor Board, 45 S. Ct. 621, 268
U. S. 619, 69 L. Ed. 1119;
United States v. Alaska Packers Assn. (C. C. A. D. C.),
30 Fed. (2d) 564;
Credit Mobilier Act, March 3, 1873 (45 U. S. C. A. Secs.
81, 88).

SUBSTANTIVE RIGHTS OF A DEFENDANT

United States v. Sherwood, 312 U. S. 584, 85 L. Ed.
1058;
Act of Congress, June 19, 1934, Ch. 651;
Order of Supreme Court, June 3, 1935;
Sibbach v. Wilson & Co., 312 U. S. 1, 85 L. Ed. 479;
Section 113, U. S. C. A., Title 28;
Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S.
165, 84 L. Ed. 167;
Trolio v. Nichols, 133 So. 207, 160 Miss. 611, 617;
Robertson v. Railroad Labor Board, 268 U. S. 619, 69
L. Ed. 1119, 1123;
Section 51, Judicial Code, 28 U. S. C. A. Sec. 112;
Employers Reinsurance Co. v. Bryant, 299 U. S. 374, 81
L. Ed. 289;

Sewchulis v. Lehigh Valley Coal Co., 2 Cir., 233 Fed. 422;

Carby v. Greco (D. C. Ky.), 31 Fed. Supp. 251, 254;

Melekov v. Collins (D. C. Cal.), 30 F. Supp. 159.

POINT III

No authoritative case is cited sustaining the rule adopted by the Circuit Court of Appeals in this case.

McCormick Harvesting Mach. Co. v. Walthers, 134 U. S. 41, 33 L. Ed. 833;

Munter v. Weil Corset Co., 261 U. S. 276, 67 L. Ed. 652;

Seaboard Rice Milling Co. v. C., R. I. & P. R. Co., 270 U. S. 363, 70 L. Ed. 633;

Massachusetts Bonding & Ins. Co. v. Concrete Steel Bridge Co., 4 Cir., 37 Fed. (2d) 695;

Schwarz v. Artcraft Silk Hosiery Mills, 2 Cir., 110 Fed. (2d) 465;

Williams v. James (D. C. La.), 34 Fed. Supp. 61;

Coastal Club v. Shell Oil Co., 45 Fed. Supp. 859;

Andrews v. Joseph Cohen & Sons, 45 Fed. Supp. 732;

O'Leary v. Loftin (D. C. N. Y.), 3 F. R. D., 36;

Swerling v. New York & Cuba Mail S. S. Co. (D. C. N. Y.), 33 Fed. Supp. 721;

Salvatori v. Miller Music, Inc., et al., 35 Fed. Supp. 485;

Schwarz v. Artcraft Silk Hosiery Mills, 110 F. 2d 465.

POINT IV

This suit could only be maintained in the District Court of the United States for the Southern District of Mississippi which embraced Hinds County, Mississippi, where the cause of action accrued.

Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 So. (2d) 344;

Cohen et al. v. American Window Glass Co., 126 Fed. (2d) 111;

Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167, 128 A. L. R. 1437;

Oklahoma Packing Co. v. Oklahoma Gas and Electric Co., 100 Fed. (2d) 770 (C. C. A. 10);

Ward v. Studebaker Sales Corp., 113 Fed. (2d) 567 (C. C. A. 3);

Dehne v. Hillman Inv. Co., 110 Fed. (2d) 456 (C. C. A. 3);

North Butte Mining Co. v. Tripp, 128 Fed. (2d) 588 (C. C. A. 9);

Atchison, T. & S. F. Ry. Co. v. Drayton (8th Circuit), 292 Fed. 15;

Birdwell v. Indemnity Ins. Co. (D. C. S. D. Texas), 48 Fed. Supp. 950.

POINT V

The respondent was not a resident of the Northern District of Mississippi but resided in the Southern District of Mississippi.

Sartor v. Arkansas Natural Gas Corp., 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967;

Crites, Inc., v. Prudential Ins. Co., 322 U. S. 408, 64 S. Ct. 1075, 88 L. Ed. 1356.

District of Columbia v. Henry C. Murphy, 314 U. S. 441, 86 L. Ed. 329;

Philadelphia R. Co. v. McKibbin, 243 U. S. 264, 61 L. Ed. 710;

Gilbert v. David, 235 U. S. 561, 59 L. Ed. 360;

Granite Trading Corp. v. Harris, 80 Fed. (2d) 174, (4 Cir.);

Wright v. Schneider (C. C., E. D. Mo., 1887), 32 Fed. 705;

Pacific Ins. Co. v. Tompkins (4 Cir., 1900), 101 Fed. 539;

Tudor v. Leslie (D. C. Mass., 1940), 35 Fed Supp. 969;

Causey v. Lockridge (D. C. S. C., 1938), 22 Fed. Supp. 692;

- Prince v. New York Life Ins. Co.* (D. C. Mass., 1938),
 24 Fed. Supp. 41;
Bank of Cruger v. Hodge, 189 Miss. 356, 198 So. 26;
Ritter v. Whitesides, 179 Miss. 706, 176 So. 728;
McHenry v. State, 119 Miss. 289, 80 So. 763;
Hattiesburg v. Mollers, 118 Miss. 154, 79 So. 87;
Hairston v. Hairston, 27 Miss. 704.

VII

Argument.

POINT I

The United States District Court for the Northern District of Mississippi was without jurisdiction of this case and the District Judge correctly sustained petitioner's motion to dismiss. The Circuit Court of Appeals has decided a Federal question in a way in conflict with applicable decisions of this Court and in conflict with the decisions of other Circuit Courts of Appeal on the same matter.

It was conceded in the Courts below that the petitioner was a Delaware corporation having its only and principal place of business in Mississippi at Jackson where it had appointed an agent for service of process; that it had transacted no business of any kind in the Northern District of Mississippi; that it was not present therein; that it had no office, officer, agent, or servant in the Northern District of Mississippi; but that in Jackson, in the Southern District of Mississippi, it had its offices where its officers resided, its books and records were kept, and its corporate business transacted.

The District Court for the Northern District of Mississippi was without power to proceed in this case because it was without jurisdiction. It was necessary in order that it might entertain the case that it have jurisdiction of the

parties; that is to say, the plaintiff, respondent, the defendant, petitioner, as well as the subject matter.

The elements of jurisdiction are:

(a) That the Court have cognizance of the class of case in which the one to be adjudged belongs;

(b) That the proper parties are before the Court.

In personal actions there must be jurisdiction both of the subject matter and of the person, that is to say, the Court must have jurisdiction of the subject matter and personal jurisdiction of the defendant. The latter is usually known as venue or territorial jurisdiction.

In *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359, 47 S. Ct. 400, 71 L. Ed. 684, the Court refers to venue as "local jurisdiction". The jurisdiction of the District Courts of the United States comes from art. 3, Sections 1, 2, Constitution of the United States; Section 41, Title 28, U. S. C. A.

Illinois Central R. Co. v. Adams, 180 U. S. 28, 21 S. Ct. 251, 45 L. Ed. 410; *Re Indiana Transp. Co.*, 244 U. S. 456, 37 S. Ct. 717, 61 L. Ed. 1253; *Erickson v. United States*, 264 U. S. 246, 44 S. Ct. 310, 68 L. Ed. 661; *United States v. Arredondo*, 6 Pet. 691, 709, 8 L. Ed. 547; *Lessee of Grignon v. Astor*, 2 How. 319, 338, 11 L. Ed. 283, 290.

The question, however, of venue or territorial jurisdiction, that is to say, the place where a suit may be filed, is exclusively for the determination of Congress. Venue may be fixed in no other manner and by no other authority. This is a personal action transitory in nature.

The jurisdiction and venue of suits in District Courts of the United States is expressly provided by the Acts of Congress. Sections 112 and 113, Title 28, U. S. C. A., pro-

vide the district in which civil suits shall be brought. Paragraph (a) thereof contains the following provision:

"(a) Except as provided in Sections 113 to 117 of this title, no person shall be arrested in one district for trial in another in any civil action before a district court; and, except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant."

The foregoing is the basic general provision as to where civil suits shall be filed in the District Courts of the United States. The requirement is that the suit shall be brought in the district whereof the defendant is an inhabitant. The right to be immuned from suit except as provided in the foregoing provision is a substantial right of the defendant. The paragraph, however, contains the following provision:

"* * * but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

The provision contained in the statute last above quoted does not enlarge the territorial jurisdiction of the Court; upon the other hand, the provision is restricted.

In *Ex parte Shaw*, 145 U. S. 444, 36 L. Ed. 768, 771, this Court, through Mr. Justice Gray, used the following language:

"The Act of 1887, both in its original form and as corrected in 1888, re-enacts the rule that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant, but omits the clause allowing a defendant to be sued in the district where he is found, and adds this clause: 'but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' 24 Stat. at L.

552; 25 Stat. at L. 434. As has been adjudged by this court, the last clause is by way of proviso to the next preceding clause, which forbids any suit to be brought in any other district than that whereof the defendant is an inhabitant; and the effect is that 'where the jurisdiction is founded upon any of the causes mentioned in this section, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but where the jurisdiction is founded solely upon the fact that the parties are citizens of different states, the suit may be brought in the district in which either the plaintiff or the defendant resides.' *McCormick Harvesting Mach. Co. v. Walthers*, 134 U. S. 41, 43 (33:833, 834). And the general object of this Act, as appears upon its face, and as has been often declared by this court, is to contract, not to enlarge, the jurisdiction of the circuit courts of the United States. *Smith v. Lyon*, 133 U. S. 315, 320 (33:635, 637); *Re Pennsylvania Co.*, 137 U. S. 451, 454 (34:738, 740); *Fisk v. Henarie*, 142 U. S. 459, 467 (35:1079, 1082.)"

Under the foregoing section it was necessary in order that jurisdiction of the person of the petitioner might be had that it be present within the territorial jurisdiction of the Court. This section applies to states having one federal judicial district and venue may not be had therein and territorial jurisdiction obtained over petitioner unless within the territorial jurisdiction of the Court. This is not an action of a local nature but transitory. The statute confers no territorial jurisdiction except as to a defendant within the territorial jurisdiction of the Court. It does not contemplate or permit the issuance of process to another state or district. If the plaintiff be a resident of the District, the defendant must be a foreign corporation engaged in business therein; if the plaintiff be a non-resident of the State of Mississippi, the defendant must be a resident or inhabitant of the district, or, since the *Neirbo* case, a foreign corporation consenting to be sued within the district in which the suit is brought.

This section has application where there are one or more defendants residing in the same district. Section 113 contains the following language:

“Judicial Code, section 52. Suits in States containing more than one district. When a State contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides.”

It is perfectly obvious that the word “inhabitant” in Section 112 and the word “resident” in Section 113 are synonymous.

The last mentioned section has application where a state contains more than one district and there are one or more defendants residing in different districts. The petitioner in this case was the sole defendant. It had never transacted business of any character in the Northern District of Mississippi; it had for some years, however, transacted business in the Southern District of Mississippi, with its only office and place of business in Jackson, Mississippi, where the cause of action accrued, if any, and where its agent for service of process resided.

This case involved more than the question of venue or territorial jurisdiction. It involved the question of personal jurisdiction over the petitioner. Personal jurisdiction over a foreign corporation could be obtained whether the suit was brought by a resident or non-resident of the state only in the district where the foreign corporation trans-

acted business. The District Judge so held, using the following language:

"In the Court's judgment the Rules of Civil Procedure have not in any way enlarged either the jurisdiction or venue of the District Court.

"As I read the opinion of the Supreme Court of the United States in *Neirbo Co. vs. Bethlehem Corporation*—308 U. S. 167—what the Court holds is in substance that for purposes of jurisdiction the Court will still recognize the legal fiction of citizenship of a corporation in the State of its incorporation; but that for purposes of venue it will adopt the practical and realistic view that such corporations are domiciled in any District where they do business and have in accordance with the mandates of State law appointed agents for the service of process.

"If this be the correct view of the holding in the *Neirbo* case it follows that under Section #113 of the Judicial Code the defendant in this case, is in that limited sense, an inhabitant of the State of Mississippi, and entitled to be sued in the District of the State where it resides.

"It follows that there is not proper venue in the Northern District of Mississippi and the motion to dismiss for want of venue is sustained.

"This holding is in line with *St. Louis S. W. Railroad vs. Alexander*—227 U. S. 218—and in the Court's judgment presents a clear and workable application of the Rules of Civil Procedure and the rules of law as announced in the *Neirbo* and the *St. Louis S. W. Railroad* case above referred to."

Since there are two federal districts in Mississippi and petitioner was the sole defendant, under the positive provisions of Section 113, the suit could only be maintained in the district in which the petitioner was an inhabitant. The United States Circuit Court of Appeals incorrectly held that Section 113 was only a supplement to Section 112. This holding is in conflict with the decision of this Court

in *Stonite Products Co. v. Melvin Lloyd Company*, 315 U. S. 561, 86 L. Ed. 1026, wherein it is held that Section 113 announces the exception to the Rule announced in Section 112. The petitioner transacted business in the Southern District of Mississippi where it appointed an agent for service of process, consented to be sued therein, which was the equivalent for jurisdiction and venue purposes of its being an inhabitant of the Southern District of Mississippi.

In the case of *The Galveston, Harrisburg & San Antonio Railway Company v. Victor Gonzalez*, 151 U. S. 496, 38 L. Ed. 248, it is expressly held that where there are two districts within a state a suit against a corporation must be filed where its general offices are located.

The question was stated with accuracy and clearness in the case of *St. Louis S. W. R. Co. v. Alexander*, 227 U. S. 218, 57 L. ed. 486, 488. In that case suit was filed in the state court of New York against the appellant, a foreign corporation. The case on the petition of the appellant was removed to the United States District Court for the Southern District of New York. There the appellant sought to have the suit dismissed for want of jurisdiction over it because it alleged that it was a foreign corporation, had never transacted any business in the Southern District of New York and, therefore, the Court had acquired no jurisdiction over it. This Court announced the following rule applicable thereto:

“The other question as to the presence of the corporation within the jurisdiction of the court in which it was sued raises more difficulty. A long line of decisions in this court has established that in order to render a corporation amenable to service of process in a foreign jurisdiction it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof. *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451; *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Goldey v. Morning News*,

156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728; *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 47 L. ed. 1122, 23 Sup. Ct. Rep. 807; *Peterson v. Chicago, R. I. & P. R. Co.*, 205 U. S. 364, 51 L. ed. 84, 27 Sup. Ct. Rep. 513; *Green v. Chicago, B. & Q. R. Co.*, 205 U. S. 530, 51 L. ed. 916, 27 Sup. Ct. Rep. 595; *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. ed. 272, 30 Sup. Ct. Rep. 125; *Herndon-Carter Co. v. James N. Norris Son & Co.*, 224 U. S. 496, 56 L. ed. 857, 32 Sup. Ct. Rep. 550."

In *Green v. C. B. & Q. Ry. Co.*, 205 U. S. 530, 51 L. Ed. 916, the Court said:

"The question here is whether service upon the agent was sufficient; and one element of its sufficiency is whether the facts show that the defendant corporation was doing business within the district. It is obvious that the defendant was doing there a considerable business of a certain kind, although there was no carriage of freight or passengers. In support of his contention that the defendant was doing business within the district in such a sense that it was liable to service there, the plaintiff cites *Denver & R. G. R. Co. v. Roller*, 49 L. R. A. 77, 41 C. C. A. 22, 100 Fed. 738, and *Tuchband v. Chicago & A. R. Co.* 115 N. Y. 437, 22 N. E. 360. The facts in those cases were similar to those in the present case. But in both cases the action was brought in the state courts, and the question was of the interpretation of a state statute and the jurisdiction of the state courts.

"The business shown in this case was, in substance, nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute 'doing business' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it. This view accords with several decisions in the lower Federal courts. *Maxwell v. Atchison, T. & S. F. R. Co.* 34 Fed. 286; *N. K. Fairbank & Co. v. Cincinnati, N. O. & T.*

P. R. Co. 4 C. C. A. 403, 9 U. S. App. 212, 54 Fed. 420; Union Associated Press v. Times-Star Co. 84 Fed. 419; Earle v. Chesapeake & O. R. Co. 127 Fed. 235."

In *Bank of America v. Whitney Central National Bank*, 261 U. S. 171, 67 L. Ed. 594, 596, the Court said:

"The jurisdiction taken of foreign corporations, in the absence of statutory requirement or express consent, does not rest upon a fiction of constructive presence, like *qui facit per alium facit per se*. It flows from the fact that the corporation itself does business in the state or district in such a manner and to such an extent that its actual presence there is established. That the defendant was not in New York, and hence, was not found within the district, is clear."

Other cases directly in point are:

Peoples Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 62 L. Ed. 587; *Green v. C. B. & Q. Ry. Co.*, 205 U. S. 530, 51 L. Ed. 916; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451; *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *Goldey v. Morning News*, 156 U. S. 518, 39 L. Ed. 517; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113; *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 47 L. Ed. 1122; *Peterson v. Chicago, R. I. & P. R. Co.*, 205 U. S. 364, 51 L. Ed. 841; *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. Ed. 272.

The decision of the Circuit Court of Appeals in this respect is in conflict with the following decisions of other Circuit Courts of Appeals on the same matter:

Sperry Products, Inc. v. Association of American Railroads, 2 Cir., 132 Fed. (2d) 408; *London v. N. & W. Ry. Co.*, 4 Cir., 111 Fed. (2d) 127; *McCall Co. v. Bladsworth*, 290 Fed. 365, 2 Cir.; *Sewchulis v. Lehigh Valley Coal Co.*, 2 Cir., 233 Fed. 422.

The position of the respondent is that since there was diversity of citizenship and the subject matter was of the character of which the Court had jurisdiction and in view of

the fact that the petitioner had appointed an agent for service of process in the State of Mississippi, it had waived all question of jurisdiction and venue and consented that it might be sued in any Court, state or federal, in the State of Mississippi.

—Section 5319, *Mississippi Code 1942*, required the petitioner to designate an agent for service of process. A copy of the statute is made *Appendix "C"* hereto:

It is the position of the petitioner that the appointment of an agent for the service of process merely provides a method of serving process upon the litigant making the appointment, but that any suit must be filed in a Court having jurisdiction over such defendant and the venue must be properly laid, that is to say, the mere appointment of an agent for service of process does not determine the question of jurisdiction or venue but merely gives consent by the defendant to be sued in a county or district of the state where the Court has jurisdiction and the venue properly laid.

The Supreme Court of Mississippi has expressly held that the Mississippi statute requiring the appointment of an agent for service of process does not constitute a waiver of the litigant to question either the jurisdiction of the Court or the venue of the action. The statute means that the appointment is state-wide and the litigant has consented to be sued in any Court, State or Federal, in the state where the Court has jurisdiction and the venue is properly laid.

The case of *Forman v. Mississippi Publishers Corporation*, 195 Miss. 90, 14 So. (2d) 344, is directly in point. In that case the appellant sued the appellee in the Circuit Court of Sunflower County for an alleged libelous publication contained in newspapers published by the appellee and circulated for the first time in Jackson, the First Judicial District of Hinds County, Mississippi, the domicile of the appellee. The appellant's declaration alleged that the cause of action accrued in Sunflower County, Mississippi,

where the newspaper circulated. The trial Judge dismissed the suit for lack of jurisdiction and because the venue was improperly laid. In affirming the case the Supreme Court of Mississippi used the following language:

"The venue is to be determined from a construction of Code 1930, Section 495, Amended by Chapter 248, Laws 1940: 'Civil actions of which the circuit court has original jurisdiction shall be commenced in the county in which the defendant or any of them may be found, and if the defendant is a domestic corporation, in the county in which said corporation is domiciled, or in the county where the cause of action may occur or accrue' The defendant, although a foreign corporation, has appointed a resident agent and is subject to the same rights and disabilities as to venue as are domestic corporations. *Standford v. Dixie Construction Co.*, 157 Miss. 626, 128 So. 887. The newspaper here involved is edited, composed and issued in Hinds County. It is also, in both a popular and technical sense, there published. The question therefore further narrows to a construction of the quoted statute which requires venue in the county 'where the cause of action may occur or accrue.' "

Venue of actions in the State of Mississippi is provided in Section 1433, *Mississippi 1942 Code*, and is made *Appendix "D"* to this brief.

The Supreme Court of the State of Mississippi, in construing the statute requiring the appointment of an agent for service of process, expressly in the above case held that neither the question of jurisdiction nor venue were in any manner changed but that the suit should be filed where the cause of action accrued. Such construction, of course, is binding upon this Court. The construction placed upon a state statute by the Courts of the state is binding upon the Federal Courts. *Guaranty Trust Co. v. Blodgett*, 287 U. S. 509, 77 L. Ed. 463; *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U. S. 109, 81 L. Ed. 540; *Schwylkill*

Trust Co. v. Pennsylvania, 302 U. S. 506, 82 L. Ed. 392; *Bacon v. Martin*, 305 U. S. 380, 83 L. Ed. 233; *Joseph Dixon Crucible Co. v. Paul*, 5 Cir., 167 Fed. 784.

In the case of *Turner v. Board of Trade of City of Chicago* (Cert. denied, 245 U. S. 667, 62 L. Ed. 538), 7 Cir., 244 Fed. 108, the Court used the following language:

“Respondent is organized under the laws of the State of Illinois. As a general rule, the construction which the highest court of a state has given to a statute of a state becomes a part thereof and should be read into it. *Douglas v. County of Pike*, 101 U. S. 677, 25 L. Ed. 968.”

In the case of *Waterman v. Canal Bank & Trust Co.*, 5 Cir., 186 Fed. 71 (Cert. denied, 220 U. S. 621, 55 L. Ed. 613), the Court used the following language:

“The construction which the Supreme Court of Louisiana has placed on these articles of the Civil Code should be controlling in the federal courts. Such construction becomes, in effect, a part of the statute, to be enforced by this court as it would be enforced by the Louisiana courts had the complainant selected that forum.”

See, also *Gregg Dyeing Co. v. Query*, 76 L. Ed. 1232, 286 U. S. 472; *Gatewood v. State of North Carolina*, 203 U. S. 531, 51 L. Ed. 305; *Green v. Frazier*, 253 U. S. 233, 64 L. Ed. 878.

In *St. Mary's Petroleum Co. v. West Virginia*, 203 U. S. 183, 27 S. Ct. 132, 51 L. Ed. 144, the Court said:

“The construction and effect given by the state court to a state statute of this character, or to a power of attorney executed pursuant thereto, will be followed by federal courts sitting within that jurisdiction. *Pennsylvania Fire Insurance Co. v. Gold Issue Co.*, 243 U. S. 93, 37 S. Ct. 344, 61 L. Ed. 610; *Louisville Railway Co. v. Chatters*, 279 U. S. 320, 49 S. Ct. 329, 73 L. Ed. 711; *Maichok v. Bertha-Consumers Co.*, (C. C. A.) 25 Fed.

(2d) 257; *Smolik v. Philadelphia Iron Co.* (D. C.) 222 F. 148; *Mooney v. Buford Co.* (C. C. A.) 72 F. 32.

“And as was well said by Mr. Justice Holmes, in *Mitchell Furniture Co. v. Selden Breck Co.*, 257 U. S. 213, 42 S. Ct. 84, 85, 66 L. Ed. 201, at page 203:

“‘Of course, when a foreign corporation appoints one (Statutory attorney), as required by statute, it takes the risk of the construction that will be put upon the statute and the scope of the agency by the state court.’

“See, also, *Bagdon v. Philadelphia Iron Co.*, 217 N. Y. 432, 111 N. E. 1075, L. R. A. 1916F, 407, Ann. Cas. 1918A, 389.”

There is nothing to the contrary in the case of *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 84 L. Ed. 167, 128 A. L. R. 1437, or the case of *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U. S. 4, 84 L. Ed. 537. In the *Neirbo* case a resident of New Jersey brought suit in the United States District Court for the Southern District of New York against several corporate defendants; one of them, the Bethlehem Corporation, a Delaware corporation, which maintained its principal office and was engaged in business in the Southern District of New York. The Bethlehem took the position that it could not be sued by a non-resident of New York except at its domicile. This Court held that by the appointment of an agent for the service of process, the defendant had consented to be sued in the federal courts of New York in the district where it was engaged in business and maintained its principal office and place of business, that is to say, before a Court having jurisdiction of it and where the venue was properly laid. The question in that case was as to whether or not a foreign corporation, though maintaining its principal place of business, could be sued therein by a non-resident of the state. This Court held that the Bethlehem, having appointed an

agent for the service of process under the laws of New York, had waived any objection which it might otherwise assert against being sued in a federal court by a non-resident of New York other than at the place of its domicile and had consented to be sued in the federal court of the State of New York in a district where it maintained its principal place of business before a Court having jurisdiction over it. The opinion in the *Neirbo* case was bottomed upon the case of *Ex Parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853, where it was held that a foreign insurance company, as a condition precedent to doing business in the State of Pennsylvania, appointed an agent for service of process, had consented to be sued in the state and might be sued in the Federal Court of the district in which said company transacted business by a citizen of the State of Pennsylvania.

The *Schollenberger* case refers to the case of *Baltimore & Ohio R. Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354, where a foreign railroad corporation was transacting business in the District of Columbia, where it had consented to be sued. The Court held that suit might be maintained in the District Court of the United States within the District by a non-resident of the District.

The *Neirbo* case is based upon the philosophy that the Bethlehem, having appointed an agent for service of process, it had consented to be sued in any court in the state, state or federal, having jurisdiction where the venue was properly laid, that the Bethlehem had waived its right to assert that it could only be sued by a non-resident in the state of its domicile. The status occupied by the Bethlehem under such circumstances was equivalent to and for practical jurisdiction or venue purposes that of a resident or inhabitant of the district in which it transacted business. The Court did not decide that the Bethlehem was subject to suit either by a resident or non-resident of the State of New York in any district other than that in which it was engaged

in business. Judge Frankfurter used the following language:

"It does not enlarge or diminish jurisdiction of the subject-matter. It means that whenever jurisdiction of the subject-matter is present, service on the agent shall give jurisdiction of the person. *Bagdon v. Philadelphia & R. Coal & I. Co.*, 217 N. Y. 432, 436, 437, 111 N. E. 1075, LRA 1916F, 407 Ann. Cas. 1918A, 389."

It will be noted that in the case of *Bagdon v. Philadelphia & R. Coal & I. Co.*, 217 N. Y. 432, 111 N. E. 1075, LRA 1916F, 407 Ann. Cas. 1918A, 389, the suit was filed against a foreign corporation transacting business within the jurisdiction of the Court and the Court announced that the appointment of an agent for service of process was for no other purpose than to provide a convenient method of serving the defendant.

The case of *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U. S. 4, 84 L. Ed. 537, is identical in principle with the *Neirbo Case*.

In the case of *Ex Parte Schollenberger*, *supra*, the Court held that although the foreign corporation had consented to be sued in the state that it was not necessary to decide as to whether or not such foreign corporation became an inhabitant of the state within the venue statute.

In the case of *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 36 L. Ed. 768, the Court held that as to individuals the words "inhabitant" and "resident" in the venue statutes were synonymous.

The case of *Schwarz v. Aircraft Silk Hosiery Mills*, 2 Cir., 110 F. 2d 465, 467, interpreted the opinion of this Court in the *Neirbo Case* to mean that a foreign corporation is to be treated as a resident of the district in which it transacts business. The Court used the following language, page 467:

"Schwarz was alleged to be a stockholder and also a director of the corporation. In *Philipbar v. Derby*, 2 Cir., 85 F. 2d 27, we held that 28 U. S. C. A. Sec. 112, so limited the venue in a derivative suit by a stockholder of a corporation that such a suit could be brought in a federal court only in a district where the corporation might have brought it. Since the decision in *Neirbo Company et al. v. Bethlehem Shipbuilding Corporation, Ltd.*, 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. —, Nov. 22, 1939, it may be that this corporation is to be treated as a resident of the Southern District of New York. We leave that open for the present as we think the objection as to venue is futile in any event."

In the recent case of *Moss v. Atlantic Coast Line R. Co.*, 2 Cir., 149 Fed. (2d) 701, it is distinctly held that a foreign corporation doing business in a state by the appointment of an agent for service of process is a resident of the state, citing the *Neirbo Case*.

In the case of *Thomas v. South Butte Mining Co.*, 9 Cir., 230 Fed. 968, 969, the following language was used:

"First, that the trial court had no jurisdiction of the cause, for the reason that it was not alleged in the appellee's complaint that the South Butte Mining Company, which was alleged to be corporation of Minnesota, was also an 'inhabitant' of that state; the allegation being that it was a citizen and 'resident' of that state. We need devote no time to discussion of this point. It has always been held, in construing the acts of Congress which define the jurisdiction of the federal courts, that the word 'inhabitant' is synonymous with 'resident.' *Bogue v. Chicago, B. & Q. R. Co.* (D. C.) 193 Fed. 728, 733; *Stone v. Chicago, B. & Q. R. Co.* (D. C.) 195 Fed. 832; *Bicycle Stepladder Co. v. Gordon* (C. C.) 57 Fed. 529; *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; *United States v. Penelope*, 2 Pet. Adm. 438, 27 Fed. Cas. 486."

The decision is in conflict with the following cases:

Electric Switch Co. v. United States Gauge Co., 7 Cir., 129 Fed. (2d) 166; *Sewchulis v. Lehigh Valley Coal Co.*, 2 Cir., 233 Fed. 422.

Upon the question that the appointment of an agent for service of process in a state is state-wide, counsel cite the case of *Sanford v. Dixie Const. Co.*, 157 Miss. 626, 128 So. 887. There the appellee, a foreign corporation, had its principal office and place of business in Harrison County, Mississippi where it appointed an agent for service of process. The cause of action complained of, however, occurred in Forrest County where the appellee was engaged in some kind of construction work. The Court held that under the Mississippi statutes a domestic corporation could be sued either at its domicile or where the cause of action arose, and that a foreign corporation would be placed upon exactly the same basis; and since the cause of action arose in Forrest County suit might be filed there and process served on the resident agent in Harrison County, Mississippi.

The Court did hold that the appointment of an agent for service of process was statewide, but held that the venue must be laid either in the county where the cause of action arose or where the corporation maintained its domicile if a domestic corporation, or had its principal place of business if a foreign corporation. The case of *Tri-State Transit Company v. Mondy*, 194 Miss. 714, 12 So. 2d 920, as well as the case of *Forman v. Mississippi Publishers Corporation*, *supra*, reaffirm this holding.

Venue in Mississippi as to foreign and domestic corporations is regulated by Section 5319, *Miss. 1942 Code*, a copy of which is made appendix to this Brief. It will appear from the foregoing citations that merely because a foreign corporation appoints an agent for service of process in the

state that it does not consent to be sued in any county in the state. It consents to be sued before a Court having jurisdiction where the venue is properly laid.

Counsel confuse place of service under the state statute with place where suit may be filed. Where suit is filed against a corporation, foreign or domestic, and the venue properly laid, process may issue to any county in the state for service on the process agent. Neither jurisdiction nor venue are determined by such residence.

The decision of the Circuit Court of Appeals in this case if affirmed will produce great inconvenience, expense, and hardship. The petitioner, although an inhabitant of the Southern District of Mississippi and has never transacted any business of any character in the Northern District, is required to go to the inconvenience and expense of defending itself in the United States District Court some 200 miles from the location of its principal and only office in the State of Mississippi, where, under the Mississippi statute, the cause of action, if any, accrued, its agent for service of process resides and, under the state law, the suit would have to be filed.

If the Rule announced for the Circuit Court of Appeals in this case is to prevail, a foreign corporation having its principal and only office in the State of Texas in Brownsville, in the Southern District, could be required at the suit of an alleged resident of Texas, residing in the Northern District thereof, to defend a suit not of a local nature arising in the Southern District of Texas at Amarillo, Texas, approximately 900 miles distant, or a resident of the Southern District having a cause of action might move to the extreme Northern District, acquire a residence and require the defendant to appear and defend the suit in the Northern District. A corporate defendant residing at El Paso, Texas, could be required to defend a suit, not of a local

nature, arising in El Paso in the Western District of Texas in Beaumont, in the Eastern District of the State of Texas, some 800 miles distant. In California a corporate defendant residing in the Southern District of the State, upon the same ground, could be required to go a thousand or twelve hundred miles to make its defense in an action, not of a local nature, arising in the Southern District. Other instances of inconvenience and deprivation of substantial rights might be stated.

Venue in civil actions is fixed by Act of Congress primarily for the convenience of the defendant. *Lehigh Valley Coal Co. v. Yensavage*, 2 Cir., 218 Fed. 547.

Title 28, U. S. C. A., Section 109, provides venue for patent cases at the domicile of the defendant or where the infringement took place. Section 110, providing venue for suits against National Bank Associations, requires such suit to be brought at the domicile of the Bank. Section 112 requires suit to be filed in civil actions where the defendant is an inhabitant, and Section 113 makes the same provision where a State contains more than one district. Section 114 provides venue where there is more than one division in a district. Where a district contains more than one division, suit must be filed in the division of which the defendant is an inhabitant. Section 116 provides where the subject matter is of a fixed character and lies partly in one district and partly in another, the suit may be brought in either district. Section 118 provides that suits to enforce liens on property shall be brought in the district where the property is situated. Under the Seaman Act suit must be brought in the district in which the employer resides or where his principal place of business or office is located. 46 U. S. C. A. 688.

Venue under anti-trust laws is fixed in the district where defendant is an inhabitant, or where it may be found or transacts business. 15 U. S. C. A., Section 22.

In acts under the Motor Vehicle Act, suit may be brought in any district where the party complained of is found or where the wrong is committed. 49 U. S. C. A. Section 321, paragraph (c).

The rule adopted by the Circuit Court of Appeals in this case would be in direct conflict with the general policy of Congress in fixing venue of local actions, as appears from the foregoing statutes.

POINT II

The Circuit Court of Appeals committed error in deciding that under Rule 4(f) personal jurisdiction might be obtained over the petitioner in a transitory action filed in the United States District Court for the Northern District of Mississippi, although the petitioner was not present in the District. In this respect the Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court. The decision of the Circuit Court of Appeals is contrary to that of other Circuits and if Rule 4(f) of Rules of Civil Procedure was correctly construed by the Circuit Court of Appeals in this case, then such rule violates the Act of Congress of June 19, 1934 authorizing this Court to prescribe such rules as well as the order of this Court of June 3, 1935 appointing an advisory committee for such purpose.

Assuming that the respondent was a resident of the Northern District of Mississippi, it was conceded that the petitioner was a foreign corporation transacting business only in the Southern District of Mississippi where the cause of action accrued and its agent for service of process resided. Conceding such to be the facts, the United States Circuit Court of Appeals in this case decided that under Rule 4(f), Rules of Civil Procedure of the Federal District Courts of the United States, personal jurisdiction might be obtained over the petitioner by the issuance of process in the North-

ern District of Mississippi to the Marshal of the Southern District of Mississippi for service on the petitioner's agent for service of process, that is to say, although the petitioner was not within the territorial jurisdiction of the Court, it might be served in the Southern District of Mississippi.

The Court justifies its conclusion on the ground that the Rules of Civil Procedure were submitted to this Court and approved by it and that this Court, therefore, gave its sanction to the issuance of process from one district to another. The fallacy in the position of the Court is that it overlooks the difference between jurisdiction, venue, and service of process, and determines the case under Rule 4(f) without reference to Rule 82. These rules are in the following language:

Rule 4(f) :

"Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45."

Rule 82:

"Jurisdiction and Venue Unaffected. These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein."

The Circuit Court of Appeals, under Rule 4(f), has determined that it may take personal jurisdiction of the petitioner, a corporation beyond the jurisdiction of the Court, notwithstanding the clear and unambiguous provision in Section 82 to the contrary. The Court states that it could not take jurisdiction of the subject matter but may

take personal jurisdiction of the petitioner. However, Rule 82 says that the Rules shall not be construed to extend or limit the jurisdiction of the District Courts of the United States or the venue therein. The Rule is all-comprehensive, does not require any construction, it is only necessary that the Rule be observed. The position of the Court seems to be that since the plaintiff claims to be a resident of the Northern District of Mississippi and the petitioner, a foreign corporation, that there is diversity of citizenship, and it was only necessary that the respondent be a resident of the District, but it was necessary that the petitioner be within the jurisdiction of the Court and this jurisdiction could not be obtained under Rule 4(f) because Rule 82 provides to the contrary. Neither jurisdiction nor venue may be supplemented by Rule 4(f). Jurisdiction and venue depend upon the Constitution of the United States and the Acts of Congress in respect thereto and may not be limited or extended by any Rule of Court.

It is the position of the petitioner that Rule 4(f) assumed that jurisdiction was had by the Court and venue was properly laid, that is to say, there might be two or more defendants, one or more of them residing in another district from that in which the suit was brought, or suit might be brought against a single defendant, a single corporate defendant having an agent for service of process, however residing in another district from that in which the suit was brought. Suppose, for instance, that the petitioner was transacting business in the Northern District of Mississippi, having, however, an agent for service of process in the Southern District: In such instance, Rule 4(f) would become operative and process might issue to the Southern District for service upon the process agent.

The decision of the Circuit Court of Appeals in this case is in direct conflict not only with the Acts of Congress fix-

ing venue and jurisdiction, but is in conflict with the Circuit Courts of Appeals of other circuits.

We refer the Court to the case of *Contracting Division A. C. Horne Corp. v. New York Life Ins. Co.*, 2 Cir., 113 Fed. (2d) 864. In that case the Research Laboratories, Inc., referred to as the Research, and the Contracting Division A. C. Horn Corporation, resided in the Eastern District of the State of New York. The former was the owner of a patent of which the latter was licensee. The Contracting Division Corporation filed suit in the Southern District of New York against the New York Life Insurance Company for an infringement of the patent. The New York Life Insurance Company wished to have the Research Corporation a party plaintiff so that it might file a counterclaim against each of said corporations.

It made application under Federal Rules of Civil Procedure 13(b), 19(a) and Rule 21 to that end. In order, however, to maintain a counterclaim against the Research Corporation, it was necessary that process issue from the Southern District of New York to the Eastern District of New York, and since neither of these corporations were incorporated or had offices in the Southern District the appellant would be unable to get process to issue on its application to require both corporations to join as plaintiff. Rule 4(f); therefore, was directly involved and the decision is in conflict with the present case.

The Circuit Court of Appeals in denying the motion used the following language:

“Recognizing the necessity of having the patent owner in court, the appellant moved to join Research and A. C. Horn Company as parties plaintiff, and now attacks denial of that motion as error. It relies upon Rules 13(h), 19(a), and 21 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c; but it fails to take note of Rule 82, which states that the

rules shall not be construed to extend the jurisdiction of district courts or the venue of actions therein. Neither Research nor A. C. Horn Company is a resident of the southern district of New York, nor has either a regular and established place of business in this district. They are residents of the Eastern District of New York, and have their place of business there. This presents an insuperable obstacle to forcing them against their will into a suit in the southern district, if they be viewed as corporate entities separate and distinct from the plaintiff. *Gibbs v. Emerson Electric Mfg. Co.*, D. C. W. D. Mo., 29 F. Supp. 810; *Melëkov v. Collins*, D. C. S. D. Cal., 30 F. Supp. 159."

• It is very true that the Court did not mention Rule 4(f) but the Rule was directly involved and the decision in conflict with the present one.

The Court cites the case of *Gibbs v. Emerson Electric Manufacturing Co.*, (D. C., Mo.), 29 F. Supp. 810, where the same effort was made, and the Court based its conclusion on a construction of Rule 4(f) in connection with Rule 82. The Court used the following language:

"The statute is quite specific upon this subject. Section 109, Title 28 U. S. C., 28 U. S. C. A., Section 109, undertakes to fix the venue for suits in patent cases. Venue can only be had for the infringement of letters patent 'in the district of which the defendant is an inhabitant, or in any district in which the defendant . . . shall have committed acts of infringement and have a regular and established place of business.'

"It appears conclusively that the defendant Emerson Electric Manufacturing Company is not an inhabitant of the district, and has no regular and established place of business within the district.

"Rule 4(f) of the Rules of Civil Procedure permits the service of process 'anywhere within the territorial limits of the state in which the district court is held.' This liberal rule applies only where the venue will permit.

"Rule 82 specifically provides that the rule of Civil Procedure 'shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein.' "

The Court likewise cited *Melekov v. Collins*, (D. C., Calif.), 30 Fed. Supp. 159, where the Court held that Rule 4(f) and Rule 82, Rules of Civil Procedure, must be construed together and that process could not issue for a defendant in another district unless territorial jurisdiction was present in the Court from which the process was to issue. The Court used the following language:

"Congress has in clear language defined the limits of the rule making power of the Court in the enabling act of June 19, 1934, c. 651, Section 1, 48 Stat 1064, Title 28 U. S. C. A. Section 723b. This statute in its applicable part is as follows:

" 'The Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States . . . the forms of process; writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take the effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.' "

"It is obvious that the only legislative authorization to establish rules to govern civil cases is such as provides solely for adjective matters in the course of litigation in controversies of a civil nature, as distinguished from substantive ones. The latter are to remain secure to all litigants. Undoubtedly Congress can enlarge the power of the district courts to send their process for service outside of the district. As far as we are informed it has not done so in actions like the one before us, except in the restrictive way of

keeping unimpaired historical substantive rights which are claimed by litigants. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359, 47 S. Ct. 400, 71 L. Ed. 684.

"In my opinion, Rule 4(f) *ex proprio vigore* could not, even if there did not exist in the Federal Rules of Civil Procedure a correlative requirement, operate to compel the nonresident defendant Vaught to submit personally to the jurisdiction of this district court in the case at bar. This rule is necessarily and expressly limited in its scope by act of Congress.

"But the limitations of the scope of Rule 4(f) are not entirely dependent upon the statute which we characterize as the enabling act, *supra*.

"Rule 82, which is as much a part of the scheme of the modernized procedure in civil actions in the federal courts as Rule 4(f), is a definite statement that the long-established and well-settled principles of substantive rights of civil litigants remain intact. Rule 82 is as follows:

" 'Rule 82. Jurisdiction and Venue Unaffected.

" 'These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States for the venue of actions therein.'

"In *Sewchulis v. Lehigh Valley Coal Co.*, 233 F. 422, the Second Circuit Court of Appeals aptly differentiates between the method of serving summons and the effect of such service when made, and shows that the latter activity is one which extends the jurisdiction of the District Court of the United States. Judge Hough, writing for the court, said:

" 'But there is a wide difference between the method of serving a summons and the effect of such service when made. The first relates to the 'form, manner, and order of conducting and carrying on suits.' The effect of the formal act called 'service' is not a question of practice at all, but one of jurisdiction, and jurisdiction in turn must be tested by substantive law.' "

Therefore, it is apparent that the Circuit Court of Appeals for the Second Circuit in the case of *Contracting Division v. New York Life Insurance Company* denied the motion to permit counterclaim to be filed because of the inability of the defendant to procure process on the corporations, domiciled in the Eastern District of New York. The case is directly in point and in conflict with the present decision.

The Circuit Court of Appeals of the Second Circuit by reference made the two last mentioned cases part of its opinion.

We respectfully submit that the rule was most clearly and accurately stated by Judge Charles E. Clark, of the Second Circuit, who was reporter for the Committee having in charge the adoption thereof. His statement found in *Moore's Federal Practice*, supplement to page 361, is in the following language:

"Dean, now Circuit Judge, Charles E. Clark, Reporter for the Supreme Court's advisory Committee, said in reference to Rule 4(f): 'The question has been raised whether this is not a substantive change, one affecting jurisdiction and venue. I might say on that, it is our theory that definitely it is not. This is not a matter of either the jurisdiction of the court, what matters the court shall hear and decide, or of the venue, which is the place where certain kinds of actions shall be tried. This affects neither one of those points. It simply says that in cases where the district court already has jurisdiction and venue its process may reach as far as the confines of that state itself. In other words, that is why we consider it procedural. It is simply allowing people to be brought before the court within the entire state and not merely within one district.' Proceedings before the Cleveland Institute on the Federal Rules (1938 205-206)."

The District Judge in the present case announced the same rule.

In the following cases from other Circuit Courts of Appeals it is held that the Federal Rules of Civil Procedure in no manner enlarge or abridge jurisdiction or venue:

Sturgeon v. Great Lakes Steel Corp., 6 Cir., 143 Fed. (2d) 819; *Davis v. Ensign-Bickford Co.*, 8 Cir., 139 Fed. (2d) 624; *Dan Cohen Realty Co. v. Natl. Savings & Tr. Co.*, 6 Cir., 125 Fed. (2d) 288; *Doyle v. Loring*, 6 Cir., 107 Fed. (2d) 337; *Sewchulis v. Lehigh Valley Coal Co.*, 233 Fed. 422, 2 Cir.

The District Courts of the United States with practically unanimity announce a contrary rule to that announced by the Circuit Court of Appeals in this case and are in entire accord with the decision of the District Judge in this case and the announcement of Judge Clark, Reporter of the Committee. The following cases are directly in point:

Sturgeon v. Great Lakes Steel Corp., 6 Cir., 143 Fed. (2d) 819;

Davis v. Ensign-Bickford Co., 8 Cir., 139 Fed. (2d) 624;

Dan Cohen Realty Co. v. Natl. Sav. & Tr. Co., 6 Cir., 125 Fed. (2d) 288;

Doyle v. Loring, 6 Cir., 107 Fed. (2d) 337;

Sewchulis v. Lehigh Valley Coal Co., 2 Cir., 233 Fed. 422.

O'Brien v. Richtarsic (D. C. W. D. N. Y.), 2 F. R. D., 42; *United States ex rel. v. Commanding Officer* (D. C. E. D. N. Y.), 3 F. R. D., 360; *United States v. Skilken*, 53 Fed. Supp. 14; *Herrington v. Jones*, 2 F. R. D., 108; *Brown Paper Mill Co. v. Agar Mfg. Corp.*, 1 F. R. D. 579; *Diepen v. Fernow*, D. C. Mich., 1 F. R. D. 378; *Adolph Salvatori v. Miller Music, Inc.*, 35 F. Supp. 845; *Red Top Trucking Corp. v.*

Seaboard Freight Lines, Inc., 35 F. Supp. 740; *U. S. F. & G. Co. v. John R. Alley & Co.*, 34 Fed. Supp. 604; *Cashmere Valley Bank v. Pacific Fruit & Produce Co.*, 33 Fed. Supp. 946; *Barnsdall Refining Corp. v. Birnamwood Oil Co.*, 32 Fed. Supp. 314; *Gibbs v. Emerson Elec. Mfg. Co.*, 31 Fed. Supp. 983; *Carby v. Greco*, 31 Fed. Supp. 251; *Kellar v. American Sales Book Co.*, 16 Fed. Supp. 189; *Melekov v. Collins*, 30 Fed. Supp. 159; *Richard v. Franklin County Distilling Co.* (D. C. W. D. Ky.), 38 F. Supp. 513, 514.

In addition to the opinion of the District Judge in this case, an outstanding District Court opinion is that of Judge Miller, Western District of Kentucky, *Carby v. Greco*, 31 Fed. Supp. 251. There suit was filed by residents of the Western District of Kentucky against non-residents of the state for injury occurring in an automobile collision. The non-residents had appointed the Secretary of State, under the laws of Kentucky, as agent for service of process but the defendants were not present and could not be found in the Western District. The Court held that jurisdiction over the person of the defendants was essential.

The Court used the following language:

"The rule was stated in *Employers Reinsurance Corp. v. Bryant*, supra, as follows: 'The defendant was not before the court, and therefore it was without jurisdiction to proceed with the suit. Counsel for the petitioner assume that the presence of the defendant was not an element of the court's jurisdiction as a federal court; but the assumption is a mistaken one: By repeated decisions in this Court it has been adjudged that the presence of the defendant in a suit in personam, such as the one now under discussion, is an essential element of the jurisdiction, of a district (formerly circuit) court as a federal court, and that in the absence of this element the court is powerless to proceed to an adjudication.' "

Addressing itself to the question presented in this case, the Court used the following language:

"Congress, of course, has the power to enlarge the jurisdiction of the District Court by statute, and make such service valid in a case of this kind. But it has not done so. The statute authorizing the adoption of the New Rules specifically refrains from doing so. Title 28 U. S. C. A. 723B. Rule 82 itself embodies this statutory restriction. In construing the rules it must be kept in mind that the method of serving a summons is procedural; the effect of such service when made is jurisdictional. *Sewehulis v. Lehigh Valley Coal Co.*, 2 Cir., 239 F. 422; *Keller v. American Sales Book Co.*, D. C., 16 F. Supp. 189. In the present case the effect of holding the service valid under Rule 4(f) is to obtain jurisdiction over the defendant, where jurisdiction did not exist except for the rule. Such a construction is unauthorized under Rule 82."

In the instant case the Circuit Court of Appeals of the Fifth Circuit used the following language:

"More troublesome, perhaps, is the question whether the court of the Northern District could obtain jurisdiction over the person of the defendant by service of process outside the district. This question relates to the power of the Supreme Court to promulgate Rule 4(f) of the Federal Rules of Civil Procedure. While the rule affects neither venue nor jurisdiction over the subject matter, it does permit the court to acquire personal jurisdiction over a defendant in another district within the state in a case like the present—a power that did not exist prior to the adoption of the rules. As was pointed out in *Moore's Federal Practice*, Vol. 1, page 361, 'Since the Advisory Committee specifically called the attention of the Supreme Court to the question of its power to promulgate this rule, it may be safely assumed that the Supreme Court, by promulgating the rule, has concluded that it has the power.'"

It is necessary in order to appreciate the statement of the Committee in specifically calling the attention of this Court to the question of the power to promulgate this rule to refer to the decisions of this Court upon that subject prior thereto: It has been repeatedly held by this Court that except where specifically authorized by a federal statute, the civil process of a federal District Court does not run outside the district, and that service outside of the district is void. *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093; *Munter v. Weil Corset Co.*, 261 U. S. 276, 43 S. Ct. 347, 67 L. Ed. 652; *Robertson v. Railroad Labor Board*, 268 U. S. 619, 45 S. Ct. 621, 69 L. Ed. 1119; *Employers Reinsurance Corp. v. Bryant*, 299 U. S. 374, 57 S. Ct. 273, 277, 81 L. Ed. 289.

The inconvenience arising from the previous Rule may nowhere be better illustrated than in the case of *Employers Reinsurance Corp. v. Bryant*, 299 U. S. 374, 81 L. Ed. 289. In that case the appellant was sued in a state court in the State of Texas. It was transacting business in the Eastern District of the State of Texas. It had an agent for service of process in the Western District. The petitioner removed the case of the United States District Court for the Eastern District of Texas and there filed a motion to dismiss the process because the same was served in a district different from that in which the appellant was transacting business. By removing the case from the state court to the federal court both jurisdiction and venue were perfect. The only objection was that although jurisdiction and venue were perfect the process had been served on the appellant in a district other than that in which it transacted business.

See, also, to the same effect, *Venner v. Great Northern R. Co.*, 209 U. S. 24, 52 L. Ed. 666.

In the case of *United States v. Alaska Packers Assn.*, C. C. A. D. C., 30 Fed. (2d) 564, following the rule announced

in the *Robertson* Case, the Court used the following language:

“ ‘Congress has also made a few clearly expressed and carefully guarded exceptions to the general rule of jurisdiction in personam stated above. In one instance, the Credit Mobilier Act of March 3, 1873, c. 226, Sec. 4, 17 Stat. 485, 509 (45 U. S. C. A. Secs. 81, 88), it was provided that writs of subpoena to bring in parties defendant should run into any district. This broad power was to be exercised at the instance of the Attorney General in a single case in which, in order to give complete relief, it was necessary to join in one suit defendants living in different States. *United States v. Union Pacific Railroad*, 98 U. S. 569, (25 L. Ed. 143). Under similar circumstances, but only for the period of three years, authority was granted generally by Act of September 19, 1922, c. 345, 42 Stat. 849 (28 U. S. C. A. Sec. 112), to institute a civil suit by, or on behalf of, the United States, either in the district of the residence of one of the necessary defendants or in that in which the cause of action arose; and to serve the process upon a defendant in any district. The Sherman Act of July 2, 1890, c. 647, Sec. 5, 26 Stat. 209, 210 (15 U. S. C. A. Sec. 5), provides that when “it shall appear to the court” in which a proceeding to restrain violations of the act is pending “that the ends of justice require that other parties should be brought before the court” it may cause them to be summoned although they reside in some other district. The Clayton Act of October 15, 1914, c. 323, Sec. 15, 38 Stat. 730, 737 (15 U. S. C. A. Sec. 25), contains a like provision. But no act has come to our attention in which such power had been conferred in a proceeding in a Circuit or District Court where a private citizen is the sole defendant and where the plaintiff is at liberty to commence the suit in the district of which the defendant is an inhabitant or in which he can be found.’ ”

Rule 4(f) was inserted in the Rules doubtless so that in cases where the Court had jurisdiction and venue process

might issue to another District from that in which the corporate defendant might be domiciled or have its principal place of business. In view of the previous language used by this Court and the restriction on the issuance of process from one district to another, the Committee very probably doubted whether even in cases where jurisdiction and venue existed that by mere rule of Court in the absence of special permission of Congress process could issue from one district to another. It was not contemplated by the Committee that process would issue from one district to another where either venue or jurisdiction was absent, since such course would render the Rule out of harmony with Rule 82.

It is very true that this Court in the case of *Sibbach v. Wilson & Co.*, 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479, (January 13, 1941) sustained the validity of one of the Rules of Procedure and to that extent held that the Rules of Federal Procedure had the force and effect of a statutory enactment. This question was interestingly discussed in the case of *Richard v. Franklin County Distilling Co.*, (D. C. W. D. Ky.), 38 F. Supp. 513. In that case a resident of the State of Kentucky filed suit in the Western District thereof against a foreign corporation doing business only in the Eastern District of Kentucky. District Judge Miller held that since the foreign corporation was not doing business within the Western District of Kentucky process could not issue under Rule 4(f) to the Eastern District for service on the defendant. The Court specifically called attention to the fact that Rule 4(f) and Rule 82 must be read together, and said:

"Plaintiff claims that jurisdiction is thus acquired under Rule 4(f) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, which provides 'all process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a

statute of the United States so provides, beyond the territorial limits of that state.' Before the enactment of that rule it was well settled that in the absence of a federal statute service of process outside of the District was void. *Toland v. Sprague*, 12 Pet. 300, 9 E. Ed. 1093; *Munter v. Weil Corset Co.*, 261 U. S. 276, 43 S. Ct. 347, 67 L. Ed. 652; *Robertson v. Railroad Labor Board*, 268 U. S. 619, 45 S. Ct. 621, 69 L. Ed. 1119; *Employers Reinsurance Corp. v. Bryant*, 299 U. S. 374, 57 S. Ct. 273, 81 L. Ed. 289. If Rule 4(f) stood by itself it would seem clear that process served in the Eastern District would now be valid. But Rule 4(f) must be considered in conjunction with Rule 82, 28 U. S. C. A. following section 723c, which provides 'these rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein.' The joint effect of these two rules was considered by this court in *Carby v. Greco*, 31 F. Supp. 251, in which it was held that jurisdiction was not obtained over a defendant served in the Eastern District in an action instituted in the Western District. Reference is made to the opinion in that case for a more detailed discussion of the reasons for the conclusion reached."

It is very true that Your Honors approved Rule 4(f), but the Court also approved Rule 82 at the same time without any such interpretative addition as the Circuit Court of Appeals has made in this case. Rule 82 says that neither jurisdiction nor venue shall be diminished or enlarged by any of the rules. The Circuit Court of Appeals in this case has inserted an interpretative amendment to Rule 82 providing that personal jurisdiction may be obtained over the defendant beyond the limits of the district in which suit is filed.

This holding is contrary to the express provisions of Sections 112, 113, Title 28, U. S. C. A., and in direct conflict with Rule 82 of the Rules of Civil Procedure. No

held in *Bath County v. Amy*, 13 Wall. at page 250, 20 L. Ed. 539, that:

“‘It was a process act, designed only to regulate proceedings in the federal courts after they had obtained jurisdiction; not to enlarge their jurisdiction.

• • • It is quite too much to infer from this (statute) an enlargement of jurisdiction, or an adoption of all the powers of the state courts.’

“Section 914 must be construed in the same manner.

“It may be further noted, as a necessary, if somewhat astonishing, result of the argument for the plaintiff in error, that the construction of the statute contended for would enable the District Court, by intrusting a summons to a private person, instead of to the marshal, to enlarge its jurisdiction to the limits of a state which contains four districts. By section 787, Rev. St. U. S. (Comp. St. 1913, Sec. 1311), the marshal is empowered only to ‘execute throughout the district all lawful precepts directed to him and issued under the authority of the United States.’ Obviously, therefore, the marshal of the Eastern district can serve no summons within the Southern district; and it is certain that no law exists giving to a private person an authority in this regard which the marshal does not possess.”

Note 1 to the foregoing (page 423) will be found in the following language:

“This is the definition of ‘practice’ in Bouvier’s Law Dictionary, which in *Kring v. Missouri*, 107 U. S. 231, 2 Sup. Ct. 443, 27 L. Ed. 506, is said to be ‘the best work of the kind in this country.’”

The service of summons is merely practice or procedure, but the filing of a suit against a defendant at a place prescribed by law is a substantive right of which the defendant may not be deprived over objection.

In *Carby v. Greco* (D. C. Ky.), 31 Fed. Supp. 251, 254, the Court uses the following language:

"Congress, of course, has the power to enlarge the jurisdiction of the District Court by statute, and make such service valid in a case of this kind. But it has not done so. The statute authorizing the adoption of the New Rules specifically refrains from doing so. Title 28 U. S. C. A. Sec. 723b. Rule 82 itself embodies this statutory restriction. In construing the rules it must be kept in mind that the method of serving a summons is procedural; the effect of such service when made is jurisdictional. *Sewchulis v. Lehigh Valley Coal Co.*, 2 Cir., 233 F. 422; *Keller v. American Sales Book Co.*, D. C., 16 F. Supp. 189. In the present case the effect of holding the service valid under Rule 4(f) is to obtain jurisdiction over the defendants, where jurisdiction did not exist except for the rule. Such a construction is unauthorized under Rule 82."

In *Melekov v. Collins* (D. C. Cal.), 30 F. Supp. 159, it was held that such a construction of the rule had the effect of extending the jurisdiction of the Court and was, therefore, unauthorized.

POINT III

No authoritative case is cited sustaining the rule adopted by the Circuit Court of Appeals in this case.

The Circuit Court of Appeals cites no case sustaining its conclusion. There is cited *McCormick Harvesting Machine Co. v. Walthers*, 134 U. S. 41, 33 L. Ed. 833. There a citizen of Nebraska sued the appellant, a foreign corporation, in the Nebraska District of the Federal Court of the State where it was carrying on business. The plaintiff was a resident of the district and the foreign corporation was present within the jurisdiction of the Court.

In the case of *Munter v. Weil Corset Co.*, 261 U. S. 276, 67 L. Ed. 652, a citizen of Connecticut sued a citizen of New

approval of an erroneous construction of Rule 4(f) could be inferred merely because this Court approved the Rules in their entirety. *United States v. Sherwood*, 312 U. S. 584, 85 L. Ed. 1058, 1063. There suit was brought in the United States District Court against the United States on a contract of Kaiser. The Supreme Court of New York made an order authorizing the bringing of the suit. The jurisdiction of the United States District Court to entertain the suit was questioned and this Court held that the Rules of Civil Procedure could not be used to abridge or enlarge the substantive rights of litigants or to diminish or enlarge the jurisdiction of federal courts. The Court used the following language:

"This conclusion presupposes that the United States, either by the rules of practice or by the Tucker Act or both, has given its consent to be sued in litigations in which issues between the plaintiff and third persons are to be adjudicated. But we think that nothing in the new rules of civil practice so far as they may be applicable in suits brought in district courts under the Tucker Act authorizes the maintenance of any suit against the United States to which it has not otherwise consented. An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction and the Act of June 19, 1934, 48 Stat. at L. 1064, chap. 651, 28 U. S. C. A. Sec. 723b, authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts."

A similar question was presented, *Holiday v. Johnston*, 313 U. S. 342, 85 L. Ed. 1392, 1398. In that case it appeared that in a suit for habeas corpus the United States District Judge in California had appointed a master to make a finding of facts. Such course was according to a

long-prevailing practice in the State of California, which it is claimed had by implication received the approval of this Court. The Court held that the mere fact that such practice had appeared in cases before the Court and had been passed without notice did not justify the conclusion that the practice was proper, and further held that a mere rule of court could not overcome the plain provisions of a federal statute. The Court used the following language:

"The circumstance that the practice has grown up of referring such causes to a commissioner, has long been indulged in in the federal courts of California, and has found a place in a rule of court, cannot overcome the plain command of the statute. It is true that the practice was followed in certain deportation cases which were reviewed by this Court but, so far as appears, no point was made as to the procedure followed in those cases and the matter was passed without notice.

"It may be that the practice is a convenient one but, if so, that consideration is for Congress. In view of the plain terms in which the congressional policy is evidenced in the habeas corpus act, the courts may not substitute another more convenient mode of trial."

In exceptional instances Congress has fixed venue in one district and provided for the issuance of process to another district where the defendant might be served. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359, 47 Sup. Ct. 400, 71 L. Ed. 684, affirming 5 Cir., (1923), 295 Fed. 98, Cert. Denied 1924, 44 S. Ct. 453, 264 U. S. 597, 68 L. Ed. 868; *Robertson v. Railroad Labor Board*, 45 S. Ct. 621, 268 U. S. 619, 69 L. Ed. 1119, reversing *Railroad Labor Board v. Robertson*, 3 Fed. (2d) 488. But the able body of lawyers who comprised the Advisory Committee were confronted with the fact that seldom in the history of this country had Congress ever authorized process to be issued from one district to another without

a special act, only in one instance. This course was taken by Congress in the *Credit Mobilier Act* of March 3, 1873 (45 U. S. C. A. Secs. 81, 88) where such power might be exercised at the instance of the Attorney General under circumstances provided in the statute. Under similar circumstances, but for a limited period of three years, authority was granted by the Act of Congress, September 19, 1922 (28 U. S. C. A. Sec. 112), for the issuance of process upon a defendant in any district. See *United States v. Alaska Packers Assn.* (C. C. A. D. C.), 30 Fed. (2d) 564, *supra*.

Very naturally lawyers of the ability of Mr. Mitchell and other members of the Committee doubted, even where jurisdiction and venue were present that a provision could be made for the issuance of process from one district to another without a special Act of Congress. Judge Clark makes it perfectly clear, however, in his statement that such right could only be exercised when jurisdiction and venue were both present.

It was held in the foregoing case that the attention of the Court had not been directed to any Act where such power had been conferred where a private citizen was a defendant and where the plaintiff was at liberty to commence the suit in the district in which defendant was an inhabitant. The rule was intended to correct the inconveniences arising from the rule announced, *Employers Reinsurance Corp. v. Bryant*, *supra*, and other similar cases. The rule was never intended to apply unless venue and jurisdiction were both present.

SUBSTANTIVE RIGHTS OF A DEFENDANT

This Court, in *United States v. Sherwood*, *supra*, held that no rule of Civil Procedure gave authority to modify or abridge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts, that is to say,

no Rule of Civil Procedure may do either. We have pointed out to the Court that the decision of the Circuit Court of Appeals in this case did enlarge the territorial jurisdiction of the Court. By reason of Rule 4(f) the Court held that the District Court for the Northern District of Mississippi had obtained personal jurisdiction over the petitioner and defendant which it would not otherwise have had but for the rule. Therefore, it is perfectly clear that the Circuit Court of Appeals in the instant case has enlarged the jurisdiction and venue of the Court.

But we also desire to point out to the Court that under such a construction Rule 4(f) would be in conflict with the Act of Congress and the order of this Court promulgating the rules. The Act of Congress, June 19, 1934, in respect thereto contained the following language:

"Be it enacted * * * That the Supreme Court or the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect."

The order of the Court, date June 3, 1935, appointing the Advisory Committee for such purpose contained the following language:

"It is ordered:

"1. Pursuant to Section 2 of the Act of June 19, 1934, c. 651, 48 Stat. 1064, the Court will undertake the preparation of a unified system of general rules for cases in equity and actions at law in the District Courts of the United States and in the Supreme Court of the Dis-

trict of Columbia, so as to secure one form of civil action and procedure for both classes of cases, while maintaining inviolate the right of trial by jury in accordance with the Seventh Amendment of the Constitution of the United States and without altering substantive rights."

In *Sibbach v. Wilson & Co.*, 312 U. S. 1, 85 L. Ed. 479, there was presented to the Court for its consideration the validity of Rule 35, Rules of Civil Procedure, requiring a plaintiff to submit to physical and mental examination. In that case there was no question of venue or jurisdiction because the plaintiff had brought the suit and jurisdiction had been taken thereof. The question was as to whether or not the rule deprived the plaintiff of a substantive right. While the Court sustained the rule it pointed out that in order to bring any rule within the operation of the provision of the Act that the rule could not abridge, enlarge, or modify substantial right, and, the Court held in that case that no such right was abridged or modified.

We not only claim in this case that Rule 4(f), as construed in the instant case, altered and modified venue and jurisdiction of district courts in violation of Rule 82, but that a substantive right of the petitioner was likewise invaded, that is to say, that the place where a suit may be brought is a valuable right. The place where a suit may be brought is provided by the Act of Congress and may not be provided otherwise. The State of Mississippi having two federal districts, according to the express provisions of Section 113, U. S. C. A., Title 28, the suit could only be brought in a district whereof the defendant was an inhabitant, as enlarged, however, in the *Neirbo* case, where it is held that a foreign corporation coming into a state and appointing an agent for service of process, consents that it may be sued in the district in which it transacts business; that is to say, the petitioner had a right of immunity from

suit in this, a transitory action, except in the district wherein it had consented to be sued in Mississippi.

Addressing itself to that subject, in the case of *Trolio v. Nichols*, 133 So. 207, 160 Miss. 611, 617, the Court used the following language:

“The right of a citizen to be sued in the county of his residence is a valuable right; it is a right of importance to him—it is not a technical right. Where an action is brought in a county where any one of several defendants resides, the county must be one where a material defendant resides; he must be a proper party—he must not be joined for the sole purpose of giving the court of that county jurisdiction. If he is not a material defendant, and is joined as such by the plaintiff for the fraudulent purpose of giving the court jurisdiction, the cause will be dismissed or transferred to the proper county. 40 Cyc. 97 (and cases in the notes) 15 C. J. 800, and case notes; *Tchula Commercial Co. v. Jackson*, 147 Miss. 296, 111 So. 874.”

This rule necessarily appears in the case of *Robertson v. Railroad Labor Board*, 268 U. S. 619, 69 L. Ed. 1119, 1123. In that case the Railroad Labor Board, proceeding under Act of Congress, wished to examine the appellant. It accordingly gave him notice under the Act to appear in Chicago, Illinois, for examination. This he declined to do. In such case the Act provided that proceedings might be taken in any district court of the United States against the party. The appellant was a resident of the State of Iowa. Proceedings under the Act were instituted in Chicago, Illinois, and process was issued and served upon him requiring his appearance. Seasonable objection was made thereto and the Court held, under Section 51, Judicial Code, Section 112, Title 28, U. S. C. A., that the suit could only have been maintained against him at the place of his residence, using the following language:

"We are of opinion that by the phrase 'any district court of the United States' Congress meant any such court 'of competent jurisdiction.' The phrase 'any court' is frequently used in the Federal statutes, and has been interpreted under similar circumstances as meaning 'any court of competent jurisdiction.' * * *

(Citing Cases.) By the general rule the jurisdiction of a district court in personam has been limited to the district of which the defendant is an inhabitant, or in which he can be found. It would be an extraordinary thing if, while guarding so carefully all departure from the general rule, Congress had conferred the exceptional power here invoked upon a board whose functions are purely advisory (*Pennsylvania R. Co. v. United States R. Labor Bd.* 261 U. S. 72, 67 L. ed. 536, 43 Sup. Ct. Rep. 278; *Pennsylvania R. System v. Pennsylvania R. Co.* March 2, 1925 (267 U. S. 203, ante, 574, 45 Sup. Ct. Rep. 307)), and which enters the district court, not to enforce a substantive right, but in an auxiliary proceeding to secure evidence from one who may be a stranger to the matter with which the board is dealing. We think it has made no such extension by Section 310 of Transportation Act of 1920. It is not lightly to be assumed that Congress intended to depart from a long-established policy. *Panama R. Co. v. Johnson*, 264 U. S. 375, 384, 68 L. ed. 748, 751, 44 Sup. Ct. Rep. 391; *Re East River Towing Co.*, 266 U. S. 355, 367, ante, 324, 327, 45 Sup. Ct. Rep. 114."

In *Employers Reinsurance Co. v. Bryant*, 299 U. S. 374, 81 L. Ed. 289, *supra*, this Court said:

"In this instance the dispute or controversy was not properly within the jurisdiction of the district court unless (1) the parties were citizens of different States; (2) the value or amount involved exceeded \$3,000, exclusive of interest and costs; and (3) the defendant was before the court by reason of a general appearance or a valid service of process. Each of these elements of jurisdiction was essential, and if any was wanting

there was an absence of proper jurisdiction. The defendant was not before the court, and therefore it was without jurisdiction to proceed with the suit. Counsel for the petitioner assume that the presence of the defendant was not an element of the court's jurisdiction as a federal court; but the assumption is a mistaken one."

Sewchulis v. Lehigh Valley Coal Co., 2 Cir., 233 Fed. 422.

In that case the appellant filed suit in the Eastern District of New York against the appellee, a foreign corporation, doing business only in the Southern District thereof. Asserting that the Conformity Act applied, the plaintiff procured authority, under the Act of the State of New York, for the appointment of a private individual to serve process upon the appellee, defendant, in the Southern District of New York. The Court, speaking through Judge Hough, calls attention to the difference between the service of process and the effect of such service, using the following language:

"But there is a wide difference between the method of serving a summons and the effect of such service when made. The first relates to the 'form, manner, and order of conducting and carrying on suits.' The effect of the formal act called 'service' is not a question of practice at all, but one of jurisdiction, and jurisdiction in turn must be tested by substantive law. The portion of the Revised Statutes under consideration is the successor of the Act of Congress of May 19, 1828, c. 68, Sec. 1, 4 Stat. 278, which declared that 'the forms of mesne process . . . and the forms and modes of proceedings in suits in (certain) courts of the United States . . . shall be the same . . . as are now used in the highest court of original and general jurisdiction of the states in which the federal courts are situated. In respect of this statute it was

York in the United States District Court of Connecticut, had the process issued to New York for service and the Court held that there was an absence of jurisdiction.

In the case of *Seaboard Rice Milling Co. v. C., R. I. & P. R. Co.*, 270 U. S. 363, 70 L. Ed. 633, a citizen of Texas sued a foreign railroad corporation in the United States District Court of Missouri. The Court held that the Railway Company could only be sued by a non-resident of the State of Missouri at the place of its domicile.

In the case of *Massachusetts Bonding & Ins. Co. v. Concrete Steel Bridge Co.*, 4 Cir., 37 Fed. (2d) 695, the appellant, Bonding Company, transacted business throughout the entire state of West Virginia. It was sued in the Northern District of West Virginia on a cause of action arising in such district. Its agent for service of process, however, resided in the Southern District of West Virginia. The appellant was present within the territorial jurisdiction of the district where the suit was brought and where the cause of action arose. It was immaterial that the service of process was had on its agent for service of process in the Southern District. Since the defendant was within the territorial jurisdiction of the Court it was proper under Rule 4(f) that process issue to the Southern District of West Virginia for service on the agent.

The case of *Schwarz v. Aircraft Silk Hosiery Mills*, 2 Cir., 110 Fed. (2d) 465, is not at all in point. In that case a resident of New York sued two defendants in the United States District Court for the Southern District of New York, one a foreign corporation doing business within the territorial jurisdiction of the Court, the other an individual. The Court held that under Rule 4 (f) it was proper that process issue to another district in New York for the individual defendant since the Court had obtained jurisdiction over the corporate defendant which was present within the

jurisdiction of the Court and was making no objection thereby. As a matter of fact, the case turned upon the point as to whether or not the individual defendant was fraudulently lured within the jurisdiction.

In the case of *Williams v. James* (D. C. La.), 34 Fed. Supp. 61, suit was brought by a non-resident of the State of Louisiana in the Western District thereof against a non-resident of the State transacting business in the Western District and an insurance corporation transacting business throughout the entire state and, therefore, was within the territorial jurisdiction of the Court. Each of the defendants had appointed an agent for service of process residing in the Eastern District of Louisiana, and the Court held very properly that process might issue from the Western District of Louisiana to the Eastern District. The Court further laid emphasis on the fact that each of the defendants under the Louisiana statute was suable in the Parish where the cause of action accrued, which was within the Western District of the State of Louisiana and the Court held that each of the defendants had contracted with the State of Louisiana and consented to be sued in that particular district.

In the case of *Coastal Club v. Shell Oil Co.*, 45 Fed. Supp. 859, a suit was brought in the Western District of Louisiana by a resident of the district against the Shell Oil Company, a foreign corporation actually engaged in transacting business in the Western District of the State within the jurisdiction of the Court. Its agent for service of process, however, resided in the Eastern District, and the Court held very properly that process might issue to the Eastern District for service.

In this case there is a constant confusion. In this case there is a failure to draw a distinction between the place for service of process and the place where a suit must be

filed. The proper rule is that the Court having jurisdiction and the venue being properly laid under Rule 4(f), process may issue to any part of the State for service.

In the case of *Andrews v. Joseph Cohen & Sons*, 45 Fed. Supp. 732, it was held that a foreign corporation doing business in the Southern District of the State of Texas, where the cause of action accrued, could only be sued in such district.

The Circuit Court of Appeals in this case based its decision largely upon the authority of *O'Leary v. Loftin*, D. C. N. Y., 3 F. R. D., page 36. In that case the plaintiffs were residents of the Eastern District of New York, were injured, so it was alleged, through the negligence of a foreign corporation domiciled in the State of Florida having an office and place of business in the Southern District of New York, but not in the Eastern District thereof. Process was issued from the Eastern District of New York to the Southern District and there served upon the defendant and its Trustees. The defendants took proper steps to object to the territorial jurisdiction sought to be obtained by motion. The District Judge overruled the motion of the defendants and held that under Rule 4(f) process might issue from the Eastern District of the State of New York for service upon a foreign corporation and its Trustees not transacting business therein to be served in the Southern District thereof.

This case stands alone and is contrary to every reported case dealing with the subject matter. The District Judge stated that the decisions of District Judges outside of the City of New York were to the contrary and that it was with great hesitation that he reached the conclusion had. He was of the opinion, however, that two cases from District Judges in the City of New York supported his conclusion. *Swerling v. New York & Cuba Mail S. S. Co.*, D. C. N. Y., 33 Fed. Supp. 721. The opinion in that case does not sup-

port the conclusion reached. There was a suit filed by a resident of the Eastern District of New York against a foreign corporation doing business only in the Southern District of the State. Process issued from the Eastern to the Southern District and was there served upon the defendant. The latter did not appear and object to the jurisdiction. The District Judge held contrary to the case of *O'Leary v. Loftin*, that the case should have been filed in the Southern District of New York, but the defendant having made no objection the jurisdiction was waived. The Court used the following language:

"The summons and complaint were served at the defendant's principal place of business in the Southern District of New York. The action should have been brought in that District. See, *Peters v. Detroit & Cleveland Navigation Co.*, D. C., 24 F. 2d 454; *Caceres v. United States Shipping Board E. F. Corp.*, D. C., 299 F. 968; *Leon v. United States Shipping Board E. F. Corp.*, D. C., 286 F. 681.

"The summons and complaint were served on March 30, 1940. The defendant has not appeared generally or answered. The defendant having defaulted has waived all defenses or objections to the complaint. Rule 12(h) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c. The defendant failed to object to venue. That objection is subject to waiver. See, *Panama R. R. Co. v. Johnson*, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748; *Mannion v. United States Shipping Board E. F. Corp.*, 2 Cir., 9 F. 2d 894. Under Rule 12 the objection to venue is waived if it is not claimed before or upon entering a general appearance or answer."

Neither does the case of *Salvatori v. Miller Music, Inc., et al.*, 35 Fed. Supp. 845, support the conclusion reached by District Judge Inch. In that case suit was brought by a resident of the Eastern District of New York against Miller

v. *Prudential Ins. Co.*, 322 U. S. 408, 64 S. Ct. 1075, 88 L. Ed. 1356. The decision of the Circuit Court of Appeals is in conflict with the following applicable decisions from this Court: *District of Columbia v. Henry C. Murphy*, 314 U. S. 441, 86 L. Ed. 329; *Philadelphia R. Co. v. McKibbin*, 243 U. S. 264, 61 L. Ed. 710; *Gilbert v. David*, 235 U. S. 561, 59 L. Ed. 360.

In *Gilbert v. David*, *supra*, the Court had the identical question under consideration in this case, wherein the following rule was announced:

"It is apparent from all the testimony that the plaintiff may have had, and probably did have, some floating intention of returning to Michigan after the determination of certain litigation and the disposition of his property in Connecticut, should he succeed in disposing of it for what he considered it worth. But, as we have seen, a floating intention of that kind was not enough to prevent the new place, under the circumstances shown, from becoming his domicile. It was his place of abode, which he had no present intention of changing; that is the essence of domicile."

Other authorities are:

In *Granite Trading Corp. v. Harris*, 80 Fed. (2d) 174 (4 Cir., 1935), in a suit which had been filed in the Federal Court for the Eastern District of North Carolina, at Wilson, it was held that the Federal Court was not without jurisdiction or grounds of diversity of citizenship in an action by a New York corporation where defendant had been living in North Carolina, his native state, for two years or more, with intention of remaining there for an indefinite period, and without fixed intention of returning to New York, state of his last domicile, to make his home there, notwithstanding his belief or desire that his legal domicile remain in New York.

Other cases are *Wright v. Schneider*, 32 Fed. 705 (C. C., E. D. Mo., 1887); *Pacific Ins. Co. v. Tompkins* (4 Cir., 1900),

101 Fed. 539; *Tudor v. Leslie* (D. C. Mass. 1940), 35 Fed. Supp. 969; *Causey v. Lockridge* (D. C., E. D., S. C., 1938), 22 Fed. Supp. 632; and *Prince v. New York Life Ins. Co.* (D. C. Mass., 1938), 24 Fed. Supp. 41.

The rule announced by this Court is in exact accord with the prevailing rule in Mississippi. *Bank of Cruger v. Hodge*, 189 Miss. 356, 198 So. 26; *Ritter v. Whitesides*, 179 Miss. 706, 176 So. 728; *McHenry v. State*, 119 Miss. 289, 80 So. 763; *Hattiesburg v. Mollers*, 118 Miss. 154, 79 So. 87; *Hairston v. Hairston*, 27 Miss. 704.

The respondent evinced no intention of returning to Calhoun County whatsoever other than that he had purchased a lot in the cemetery and expected to be buried there. To entitle the respondent to invoke the jurisdiction of this Court something more than a technical claim of residence was required.

As will appear from the foregoing authorities, the terms "resident" and "inhabitant", as used in the Federal statutes dealing with venue and jurisdiction are synonymous. The respondent was neither a resident nor inhabitant of the Northern District of Mississippi.

Summary

(1) The petitioner for purposes of venue and jurisdiction is an inhabitant and resident of the Southern District of Mississippi, where it maintains its principal and only place of business in the state, where it has consented to be sued, where its process agent resides and the cause of action accrued.

(2) Mississippi contains two federal districts, and under Section 113, U. S. C. A., Title 28, suit may be brought against petitioner when sued alone in a civil action, not local, only in the Southern District of Mississippi, in which district it has consented to be sued, and is for jurisdictional and venue purposes an inhabitant thereof.

inhabitant. The District Judge appears to have been greatly disturbed in that the plaintiffs, if not permitted to maintain their suits in the Eastern District of New York, would be obliged to sue in the State of Florida. Assuming that the foreign corporation, and it is a proper assumption, had appointed an agent for service of process in the State of New York it was only necessary that the plaintiffs file their suits in the Southern District of New York under the *Neirbo* case. Certainly the individual Trustees could have been sued there. In the present case there is no such hardship. The respondent would have the right to bring his suit to Jackson, Mississippi in the Southern District of Mississippi where the petitioner has consented to be sued, where it transacts its business, the cause of action accrued, and the plaintiff for twenty-five years has maintained a home, brought up a family, and carried on a gainful occupation.

POINT IV

This suit could only be maintained in the District Court of the United States for the Southern District of Mississippi which embraced Hinds County, Mississippi, where the cause of action accrued.

Under the Mississippi statutes hereinbefore referred to, since the cause of action accrued in Hinds County, Mississippi, this suit could only be filed in a state court in such county and the Supreme Court of Mississippi in construing its own statute dealing with jurisdiction and venue held that by the appointment of a statutory agent for the service of process the petitioner assented to be sued only in the territorial jurisdiction which embraced the county in which the cause of action arose, the petitioner being engaged in business in no other county in the state. *Forman v. Mississippi Publishers Corp.*, 195 Miss. 90, 14 So. (2d) 344.

In the case of *Cohen et al. v. American Window Glass Co.*, 126 Fed. (2d) 111, Judge Clark, speaking for the Court, used the following language:

"This trend toward allowing state law to govern jurisdiction and venue over foreign corporations reached its furthest step in *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167, 128 A. L. R. 1437, where a designation of agent under state law was a waiver of federal venue."

In the case of *Oklahoma Packing Co. v. Oklahoma Gas and Electric Co.*, 100 Fed. (2d) 770 (C. C. A. 10), the Court used the following language:

"Here, the provisions of the Oklahoma Constitution and statutes respecting the admission of foreign corporations to do business in the state provided that such corporations may be sued in the county in which the cause of action arose. By complying with those provisions and obtaining a license to transact a local business in Oklahoma, the Delaware Company did more than appoint a statutory agent for service of process; it assented to be sued in any court, state or federal, whose territorial jurisdiction embraced the county in which the cause of action arose. The cause of action here sued on arose in Oklahoma County. The Western District of Oklahoma embraces that county and a regular term of the court is held at Oklahoma City in that county. We conclude that the Delaware Company, by complying with the provisions of Oklahoma law respecting the domestication of foreign corporations, waived its right to object to the venue of the court and consented to be sued in the District Court of the United States for the Western District of Oklahoma."

In the case of *Ward v. Studebaker Sales Corp.*, 113 Fed. (2d) 567 (C. C. A. 3), the Court held that a suit in the United States District Court by a nonresident was properly

Music, Inc., a corporation doing business in the Southern District of New York, and an individual officer and agent of the defendant corporation. It appears that the individual defendant was present in the Eastern District, but the corporate defendant was not. The Court held that the jurisdiction of the Court was not sought under Section 52 of the Judicial Code, but under the Copyright Law that the individual defendant was properly joined; that the corporate defendant was not so properly joined, and the cause dismissed as to it. The Court used the following language:

"As this action arises solely under the Copyright Law, the venue is controlled by that law, 17 U. S. C. A., and not determined by the provisions of the Judiciary Act, which apply to other suits in the District Courts. *Lumiere v. Mae Edna Wilder, Inc.*, 261 U. S. 174, 176, 43 S. Ct. 312, 67 L. Ed. 596.

"Section 35 of the Copyright Law reads as follows: 'That civil actions, suits, or proceedings arising under this title may be instituted in the district of which the defendant or his agent is an inhabitant, or in which he may be found.'

"This action at bar was not properly brought against the defendant, Miller Music, Inc., in this district.

"The defendant, Miller Music, Inc., is not rendered subject to suit in this district merely by the joining of A. I. Namm & Sons alleged an inhabitant of this district as a defendant.

"As I have hereinbefore pointed out, the venue of this action is controlled by Section 35 of the Copyright Law, *supra*, and not by Section 52 of the Judicial Code, *supra*, and this is analogous to the rule in patent cases. Section 48 of the Judicial Code (Title 28, Section 109, U. S. C., 28 U. S. C. A. Section 109) and the following decisions in patent cases sustain my conclusion. *Motoshaver, Inc., et al. v. Schick Dry Shaver, Inc., et al.*, 9 Cir., 100 F. 2d 236; *Cheatham Electric Switching Device Co. v. Transit Development Co. et al.*, C. C., 191 F. 727, 732."

Therefore, it is perfectly apparent that the last mentioned case did not in any manner support the conclusions reached by District Judge Inch. The District Judge seeks to justify his conclusions by the case of *Schwarz v. Aircraft Silk Hosiery Mills*, 110 F. 2d 465, but overlooks the fact that in that case the plaintiff, a resident of the Southern District of New York, joined a foreign corporation doing business in the Southern District of New York where such corporation was properly served therein with an individual served with process under Rule 4(f) in a separate district of the State. This case in no manner supports the conclusion reached. Where there is more than one district in the state and more than one defendant process may properly issue to another district to bring in the defendant residing in another district. District Judge Inch used the following language:

"As the plaintiffs reside in the Eastern District of New York and the defendants are residents of the State of Florida, the sole jurisdiction of this court over the suit rests on this above mentioned, diversity of citizenship. Judicial Code, Section 24, 28 U. S. C. A. Section 41.

"The venue of this suit is limited to either the district where the plaintiff resides or the state where the defendants reside. Judicial Code, Sect. 51, 28 U.S.C.A. Section 112."

But the District Judge overlooked that the provision in the venue statute providing that the provision in Section 51, Judicial Code, Section 112, U. S. C. A., Title 28, providing that suit must be brought either in the district where the plaintiff resided or the defendant resided, did not enlarge but restricted jurisdiction. There are two federal Districts in the State of New York, and both under Sections 112 and 113 the suit was expressly required to be brought in the district of which the defendant was a resident or

filed in the district which embraced the County, under the state statute, wherein the cause of action accrued. Other cases are *Dehne v. Hillman Inv. Co.*, 110 Fed. (2d) 456 (C. C. A. 3); *North Butte Mining Co. v. Tripp*, 128 Fed. (2d) 588 (C. C. A. 9); *Atchison, T. & S. F. Ry. Co. v. Drayton* (8th Circuit), 292 Fed. 15; *Birdwell v. Indemnity Ins. Co.* (D. C. S. D. Texas), 48 Fed. Supp. 950. We presented this view to the Court of Appeals to which the Court replied that neither Federal jurisdiction nor venue could be effected by a state statute. We merely intended, however, to present the view that if a state statute providing that a cause of action should be brought in a certain county that the appointment of an agent for the service of process limited the authority of such agent to accept service except as to a suit filed within the territorial jurisdiction provided by the state statute and that a suit in the District Court of the United States should be filed in the district which embraced the county where the suit was required to be filed under the state statute. All of the elements of Federal venue and jurisdiction should be present. Under the state statute this suit could only be filed in Hinds County, Mississippi, where the cause of action accrued, and the petitioner was engaged in business, where the evidence would necessarily be found and the respondent himself had maintained a home for twenty-five years.

POINT V.

The respondent was not a resident of the Northern District of Mississippi but resided in the Southern District of Mississippi.

The proof established that the respondent came to Jackson, Mississippi, in 1924, acquired a home near the City of Jackson in which he and his family have continuously resided. He became a member of the local branch of his religious denomination, and has continually engaged in

one or more gainful occupations, which he is following at the present time; that he still owns a very small house or residence in Calhoun County, and that respondent, without his family, spends one or two nights per annum there: Affidavit, Mrs. Marietta Bishop (R. 18); affidavit of Walter G. Johnson (R. 21); affidavit of N. R. Lamar (R. 26). Respondent made claim for homestead exemption covering his home in Jackson, Mississippi, stating that he was a resident of Hinds County, Mississippi (R. 9), covering several years (R. 9, 11, 13, 15). It appeared from the foregoing affidavits that the respondent did not claim a homestead exemption from taxation on his Calhoun County property, which he would be entitled to if he occupied the same as a homestead. Respondent had no business connection or interest of any kind in Calhoun County, in the Northern District of Mississippi. The facts contained in petitioner's affidavits were not denied.

Respondent filed a counter affidavit (R. 29), in which he conceded that for over twenty years he resided with his family in the City of Jackson, Mississippi. He expressed no intention of any kind of returning to Calhoun County in the Northern District of Mississippi. It did appear from the affidavits to which we refer that he held the office of Lieutenant-Governor for three terms, from 1924 to 1944, but that there were several years in the interval when he was not Lieutenant-Governor of Mississippi, and his duties as Lieutenant-Governor only required his presence in Jackson during the meetings of the legislature, which took place every two years and continued for not over four months.

Respondent went out of office January 1, 1944 and has never evinced any intention of returning to Calhoun County.

Upon objections to jurisdiction, the Court will examine the record for itself. *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620, 64 S. Ct. 724; 88 L. Ed. 967; *Crites, Inc.*

(3) Rule 4(f) and Rule 82, Rules of Civil Procedure, must be construed together. Without Rule 4(f) it would be conceded that this suit could not be maintained in the Northern District of Mississippi, from which it necessarily follows that the territorial venue of the United States District Court for the Northern District of Mississippi is extended by the rule announced by the United States Circuit Court of Appeals in this case.

(4) Rule 4(f), Rules of Civil Procedure, for use in the United States District Courts, could not be used to obtain personal jurisdiction in the United States District Court for the Northern District of Mississippi, over petitioner, a foreign corporation which never transacted business at any time within the district, but is an inhabitant and resident of the Southern District of Mississippi.

(5) Rule 4(f), Rules of Civil Procedure, for use in the District Courts of the United States, may not enlarge or abridge the territorial jurisdiction or venue of actions provided in Section 112 and Section 113, U. S. C. A., Title 28.

(6) The mere fact that the committee having in charge the formulation of Rules of Civil Procedure, for use in the District Courts of the United States, expressed doubt as to whether Rule 4(f) would permit the issuance of process from one district to be served in another unless specially authorized by Congress, affords no basis for the conclusion reached in this case, since such rule was only intended to apply where territorial jurisdiction was present and venue properly laid.

(7) The committee having in charge the promulgation of the Rules of Civil Procedure was confronted with the fact that in states having more than one district the agent for service of process for a foreign corporation usually being located at the seat of the State Government, might

reside in a different district from the district wherein the foreign corporation maintained its principal office and place of business, and was an inhabitant and resident and under such circumstances the foreign corporation being within the territorial limits of the district where the suit was filed, it was appropriate that under Rule 4(f) process issue to the district wherein the agent for service of process might be served.

(8) The committee having in charge the promulgation of the Rules of Civil Procedure were confronted with the rule that process could not issue from one district to another except by special permission of Congress, which has only been granted in exceptional cases, and, therefore, may have entertained some doubt where even venue and jurisdiction were present whether the issuance of such process could be authorized by a mere rule.

(9) This Court in approving Rule 4(f) at the same time approved Rule 82.

(10) Service of process and personal jurisdiction are separate and distinct and should not be confused. Personal jurisdiction may not be obtained over a foreign corporation in a civil action when sued alone, except and unless it is present within the territorial limits of the district where the suit is filed. If it is present, however, it is immaterial whether the agent for service of process may be found in the district or not.

(11) The respondent, according to the undisputed facts, was a citizen and resident of the Southern District of Mississippi where he maintained his home and transacted his business. He did not have even a fleeting intention of taking up his residence in the Northern District of Mississippi.

The petitioner respectfully submits that the decision of the United States Circuit Court of Appeals, Fifth Circuit, should be reversed and the decision of the District Judge affirmed.

Respectfully submitted,

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Attorneys for Petitioner.*

E. C. BREWER,
*Clarksdale, Mississippi,
Of Counsel.*

I, William H. Watkins, of counsel for petitioner in the above entitled cause, certify that I have this day handed to H. H. Creekmore and Rufus Creekmore, Attorneys for Respondent in the above entitled cause, in person, a true and correct copy of the foregoing brief.

This, the 22nd day of October, 1945.

WILLIAM H. WATKINS,
Of Counsel.

APPENDIX "A"

(Opinion of District Judge—Filed December 5, 1944)

The plaintiff in this cause is a resident citizen of the Northern District of Mississippi. The defendant is a non-resident corporation which does no business in the Northern District of Mississippi; but which engages in business in the Southern District of Mississippi and which in obedience to the Mississippi law has designated an agent for service of process who resides in Jackson, Mississippi in the Southern District of Mississippi. The cause of action alleged in the declaration arose in the Southern District of Mississippi. Process was served on defendant in the Southern District of Mississippi by virtue of Sec. F, of Rule 4 of the Rules of Civil Procedure.

In the Court's judgment the Rules of Civil Procedure have not in any way enlarged either the jurisdiction or venue of the District Court.

As I read the opinion of the Supreme Court of the United States in *Neirbo Co. vs. Bethlehem Corporation*—308 U. S. 167, what the Court holds is in substance that for purposes of jurisdiction the Court will still recognize the legal fiction of citizenship of a corporation in the State of its incorporation; but that for purposes of venue it will adopt the practical and realistic view that such corporations are domiciled in any District where they do business and have in accordance with the mandates of State law appointed agents for the service of process.

If this be the correct view of the holding in the *Neirbo* case it follows that under Section #113 of the Judicial Code the defendant in this case, is in that limited sense, an inhabitant of the State of Mississippi, and entitled to be sued in the District of the State where it resides.

It follows that there is not proper venue in the Northern District of Mississippi and the motion to dismiss for want of venue is sustained.

This holding is in line with *St. Louis, S. W. Railroad vs. Alexander*—227 U. S. 218—and in the Court's judgment presents a clear and workable application of the Rules of

Civil Procedure and the rules of law as announced in the Neirbo and the St. Louis S. W. Railroad case above referred to.

This December 5, 1944:

ALLEN COX,
District Judge.

APPENDIX "B"

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11254

DENNIS MURPHREE, *Appellant*,

versus

MISSISSIPPI PUBLISHING CORPORATION, *Appellee*

Appeal from the District Court of the United States for
the Northern District of Mississippi

(May 7, 1945)

Before Sibley, Hutcheson, and Lee, Circuit Judges.

LEE, *Circuit Judge*:

Appellant, alleging himself to be a resident citizen of Calhoun County in the Northern District of Mississippi, brought this suit in the United States District Court for said district against the appellee, a Delaware corporation duly qualified to engage in business in Mississippi, to recover damages alleged to have resulted from a libel published editorially in a newspaper of the appellee in the city of Jackson in the Southern District of Mississippi. Process was served in the Southern District upon appellee's resident agent for process by the marshal for that district. Appellee moved to dismiss, alleging that the court had no jurisdiction over the subject matter or of the person of

the defendant; that the venue was improperly laid; that the process was void under the law; and that the attempted service was insufficient.

The motion was tried on affidavits from which the court below found that appellant was a resident citizen of the Northern District of Mississippi; that the appellee was engaged in business in the Southern District of Mississippi, with its only office there, and, in obedience to the laws of Mississippi, had designated an agent for service of process who resided in the city of Jackson; that the cause of action alleged arose there; and that process on appellee was served in the Southern District by virtue of Section (f) of Rule 4 of the Rules of Civil Procedure, 28 U. S. C. A. following section 723c. Thereupon, the court below, interpreting the opinion in the *Neirbo* case¹ to mean that for purposes of jurisdiction the Supreme Court will still recognize the legal fiction of citizenship of a corporation in the state of its incorporation, but for purposes of venue it would adopt the practical and realistic view that such a corporation is domiciled in any district where it does business and has in accordance with the mandate of the state law appointed an agent for the service of process, concluded: "• • • it follows that under Section #113 of the Judicial Code, the defendant in this case, is in that limited sense, an inhabitant of the State of Mississippi, and entitled to be sued in the District of the State where it resides"; held "that there is not proper venue in the Northern District of Mississippi"; and dismissed the suit, without prejudice, for want of venue. This appeal followed. The sole question before us for determination is whether the District Court for the Northern District of Mississippi should have entertained the suit.

Since this is a civil suit between a citizen of Mississippi and a Delaware corporation and the amount in controversy exceeds \$3,000, federal jurisdiction over the subject matter is present. Under Section 51 of the Judicial Code, 28 U. S. C. A., Sec. 112(a), where the jurisdiction is founded only on the fact that the action is between citizens of differ-

¹ *Neirbo Co. v. Bethlehem Shipbuilding Corporation*, 308 U. S. 165, 60 S. Ct. 153, 154, 84 L. Ed. 167, 128 A. L. R. 1437.

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OCTOBER TERM, 1945

No. 234

MISSISSIPPI PUBLISHING CORPORATION,

Petitioner,

vs.

DENNIS MURPHREE,

Respondent

PETITIONER'S REPLY BRIEF

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Point II

No jurisdiction over the person of the petitioner
could be obtained through service on its process
agent in the Southern District of Mississippi pur-

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ent states, venue may be laid "in the district of the residence of either the plaintiff or the defendant." When laid, as here, at the residence of the plaintiff, the process from that court directed to the marshal of the Southern District and served by him upon the resident agent for service of process of the appellee in that district, conferred upon the court jurisdiction of the person of the appellee. Rule 4(f), Federal Rules of Civil Procedure.² The *Neirbo* case indicates nothing to the contrary. In fact the Supreme Court in that case seemed to recognize that the question before it would not have been raised had the suit been brought in the district of the residence of the plaintiff or that of the defendant. In the very beginning of the opinion, Mr. Justice Frankfurter said:

"The suit was based on diversity of citizenship and was not brought 'in the district of the residence of either the plaintiff or the defendant.'"

And no language in the opinion which follows disturbed or modified the lower court's holding that "had plaintiffs been residents of the Southern District of New York, so that venue was properly laid, service of process upon the defendant would have been had by service upon its agent."³ The rationale of the opinion in the *Neirbo* case is that a foreign corporation, by the appointment of an agent for the service of process in accordance with the laws of the state in which the corporation is doing business, waives the provisions of the venue statute which otherwise it would be entitled to assert; by such act it affirmatively consents to be sued in the courts in that state; state and federal. Prior to the *Neirbo* case the courts generally had held that such an appointment did not constitute a waiver by a corporation of its right to be sued in the district of which it was an inhabitant;⁴ but even when so holding,

² Moore's Federal Practice, Vol. I, p. 360, et seq.; Hughes, Federal Practice and Procedure, Vol. 17, Secs. 18,992 to 18,994, incl.; *Schwarz v. Aircraft Silk Hosiery Mills*, 2 Cir., 110 F. 2d 465; *O'Leary v. Lofton*, D. C., 3 F. R. D. 36.

³ *Neirbo v. Bethlehem Shipbuilding Co.*, 2 Cir., 103 F. 2d 765, 770.

⁴ See cases cited in 2 Cir., 103 F. 2d 765.

the courts recognized the right of a plaintiff in diversity of citizenship cases to subject a corporate defendant to suit in a federal court of the district of which the plaintiff was a resident.⁵

Section 113, Title 28 U. S. C. A., relied on by the Court below does not conflict with but supplements Section 112 (a). Under Sections 112(a) and 113, where diversity of citizenship exists and suit is not brought in the district of the residence of the plaintiff but in the district of the residence of the defendant, and the defendant resides in a state containing more than one district, and the suit is not one of a local nature, then venue must be laid in that district of the state where the defendant resides.

More troublesome, perhaps, is the question whether the court of the Northern District could obtain jurisdiction over the person of the defendant by service of process outside the district. This question relates to the power of the Supreme Court to promulgate Rule 4(f) of the Federal Rules of Civil Procedure. While the rule affects neither venue nor jurisdiction over the subject matter, it does permit the court to acquire personal jurisdiction over a defendant in another district within the state in a case like the present—a power that did not exist prior to the adoption of the rules. As was pointed out in Moore's Federal Practice, Vol. 1, page 361, "Since the Advisory Committee specifically called the attention of the Supreme Court to the question of its power to promulgate this rule, it may be safely assumed that the Supreme Court, by promulgating the rule, has concluded that it has the power."

In this court appellee contends that the consent to be sued flowing from the appointment of an agent for service of process under state law is limited by the state venue statutes and this limitation governs the venue of the federal courts in the state; and appellee argues that as the Mississippi statute in fixing venue of suits in the state courts

⁵ *McCormick v. Walther*, 134 U. S. 41, 10 S. Ct. 485, 33 L. Ed. 833; *Munter v. Weil Corset Co.*, 261 U. S. 276, 43 S. Ct. 347, 67 L. Ed. 652; *Seaboard Rice Milling Co. v. Chicago, R. I. & P. R. R. Co.*, 270 U. S. 363, 46 S. Ct. 247, 70 L. Ed. 633; *Massachusetts Bonding & Ins. Co. v. Concrete Steel Bridge Co.*, 4 Cir., 37 F. 2d 695.

fixes venue either in the district where the cause of action accrued or where the defendant had its principal place of business, venue in this case was improperly laid in the District Court for the Northern District of Mississippi, since the cause of action accrued in the Southern District of Mississippi and appellee had his principal place of business in that district. What the situation might be if there were no federal statute fixing venue is not before us. It is horn-book law that where a federal statute fixes the venue of the federal courts, state laws are inapplicable. Cf. *Munter v. Weil Corset Co.*, 261 U. S. 276, 278, 43 S. Ct. 347, 67 L. Ed. 652.

Considerable space is devoted in the briefs to a consideration of the issue of fact with respect to the place of residence of the plaintiff. The finding of the court below on this issue is supported by substantial evidence—evidence which has convinced us that the lower court's finding on this issue is correct.

The judgment appealed from is reversed, and the cause is remanded for proceedings in accordance with the views herein expressed.

Reversed and Remanded.

A True copy. Teste:

_____, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

APPENDIX "C"

Section 5319, Mississippi 1942 Code, contains the following language:

"Every foreign corporation doing business in the state of Mississippi, whether it has been domesticated or simply authorized to do business within the state of Mississippi, shall file a written power of attorney designating the secretary of state or in lieu thereof an agent as above provided in this section, upon whom service of process may be had in the event of any suit against said corporation; and any foreign corpora-

tion doing business in the state of Mississippi shall file such written power of attorney before it shall be domesticated or authorized to do business in this state, and the secretary of state shall be allowed such fees therefor as is (sic) herein provided for designating resident agents. Any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of this state."

APPENDIX "D"

Section 1433, Mississippi 1942 Code:

"Venue of actions, what county generally—actions against public officer to be brought in county of his residence.—Civil actions of which the circuit court has original jurisdiction shall be commenced in the county in which the defendants or any of them may be found, and if the defendant is a domestic corporation, in the county in which said corporation is domiciled, or in the county where the cause of action may occur or accrue except where otherwise provided, and except actions of trespass on land, ejectment, and actions for the statutory penalty for cutting and boxing trees and firing woods and actions for the actual value of trees cut which shall be brought in the county where the land or some part thereof, is situated; but if the land be in two or more counties, and the defendant resides in either of them, the action shall be brought in the county of his residence, and in such cases, process may be issued against the defendant to any other county. If a citizen resident in this state shall be sued in any action, not local, out of the county of his household and residence, or if a public officer be sued in any such action, out of the county of his household and residence, although a surety or sureties, or some of the sureties, on his bond, or other joint defendant, sued with him, be found or be subject to action in

such county, the venue shall be changed, on his application, before the jury is impaneled, to the county of his household and residence, whether such suit is filed before or after such officer's term of office has expired."

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REPLY BRIEF PETITIONER

brought by a non-resident of the district, the defendant, whether an individual or corporation, must be an inhabitant of and found within the district. In suits where the plaintiff is a resident of the district, the statute necessarily requires that the non-resident defendant, whether a corporation or an individual, either be present within the district or voluntarily appear. Otherwise, the section is meaningless because the court could obtain no territorial jurisdiction under this Section unless the non-resident defendant was within the district or voluntarily appeared.

The correctness of this position necessarily appears for the following reasons:

(a) *A Federal district a separate entity and the territorial jurisdiction thereof is limited by the boundaries of the district.*

There are two Federal judicial districts in Mississippi, the Northern and the Southern Districts. Congress has specifically defined the territorial boundaries of each of these districts. Section 51, therefore, in providing that at least the plaintiff or the defendant should be a resident of the district necessarily contemplated that the defendant, whether an individual or corporation, would be found within the district. That such defendant should be found within the district was just as essential to the territorial jurisdiction as that the plaintiff should be a resident of the district, unless such non-resident defendant voluntarily appeared.

In the case of *New York Trust Company v. Eisner*, 256 U. S. 345, 349, 65 L. Ed. 963, Justice Holmes uses the following language:

“A page of history is worth a volume of logic.”

The position of respondent may not be reconciled, upon the other hand it is at variance, with the Congressional history

of the Judiciary Act from 1789 down to the present date. Neither is respondent's position supported by logic. While Mississippi has two Federal districts and venue in this case is fixed under Section 52, 113 U. S. C. A., since petitioner was sued alone in a territorial action it is essential that petitioner be present within the territory of the district.

In *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093, this matter was discussed, the Court using the following language:

"The Judiciary Act has divided the United States into judicial districts. Within these districts, a circuit court is required to be holden. The circuit court of each district sits within and for that district; and is bounded by its local limits. Whatever may be the extent of their jurisdiction over the subject matter of suits, in respect to persons and property, it can only be exercised within the limits of the district. Congress might have authorized civil process from any circuit court, to have run into any state of the Union. It has not done so. It has not, in terms, authorized any original civil process to run into any other district, with the single exception of subpoenas for witnesses, within a limited distance. In regard to final process, there are two cases, and two only, in which writs of execution can now by law be served in any other district than that in which the judgment was rendered—one in favor of private persons in another district of the same state; and the other in favor of the United States, in any part of the United States. We think that the opinion of the legislature is thus manifested to be that the process of a circuit court cannot be served without the district in which it is established, without the special authority of law therefor."

Again, in *Robertson v. Railroad Labor Board*, 268 U. S. 619, 622, 69 L. Ed. 1119 (1925), the court said:

"Under the general provisions of law, a United States district court cannot issue process beyond the

limits of the district . . . and a defendant in a civil suit can be subjected to its jurisdiction in personam only by service within the district . . . Such was the general rule established by the Judiciary Act of September 24, 1789, chap. 20, Sec. 11, 1 Stat. at L. 73, 79, Comp. Stat. Sec. 1033, in accordance with the practice at the common law . . . And such has been the general rule ever since . . . No distinction has been drawn between the case where the plaintiff is the Government and where he is a private citizen."

In *Primos Chemical Co. v. Fulton Steel Corporation* (D. C. N. D. N. Y.), 254 Fed. 454, 458, the court used the following language:

"These are limitations on the judicial power. Pursuant to the authority thus conferred, Congress has established in each of the states of the United States one or more judicial districts (Judicial Code (Act March 3, 1911, c. 231) c. 5, Secs. 69-115, 36 Stat. 1105-1130 (Comp. St. 1916, Secs. 1051-1106)) and has also divided the United States into Judicial circuits. The boundaries of these districts and circuits are defined. The Congress has also provided for the appointment of one or more District Judges in each of such judicial districts (chapter 1, Sec. 1, Judicial Code (Comp. St. 1916, Sec. 968)), and for the appointment of Circuit Judges in each of the judicial circuits. Each district judge must be an actual bona fide resident of the district in and for which appointed. The jurisdiction of each of these District Courts is coextensive with the boundaries of the judicial district in and for which it is established or created, and extends no further, except in those cases where the Congress has expressly extended it.

"The Judicial Code points out these cases. . . .

"The circuit court (now District Court) of each judicial district sits within and for that district, and its jurisdiction as a general rule is bounded by its local limits.' *Toland v. Sprague*, 12 Pet. 300, 328 (9 L. Ed. 1093); *Devoe Mfg. Co.*, Petitioner, 108 U. S. 401, 2 Sup.

Ct. 894, 27 L. Ed. 764; *Barrétt v. United States*, 169 U. S. 218, 221, 18 Sup. Ct. 327, 42 L. Ed. 723."

In *Gutschalk v. Peck* (N. D. Ohio, W. D.), 261 Fed. 212, where a plaintiff residing in the district asserted the right to obtain process over a defendant in another state, District Judge Killits used the following language:

"Applying these criteria, we hold that the language depended upon from section 51 of the Judicial Code is not in fact an attempt to enlarge, from previous legislation, the court's jurisdiction over the person of a nonresident defendant, but it is a limitation thereof. Previous to 1888, when section 51 became the law, jurisdiction of an individual was given to a federal court of first instance in this language (Act March 3, 1875, c. 137, Sec. 1, 18 Stat. 470):

" 'No civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in *which he shall be found at the time of serving such process or commencing such proceeding*, except as hereinafter provided.' "

"Comparing this language with that above quoted from the act of 1888 (Act Aug. 13, 1888, c. 866, Sec. 1, 25 Stat. 433 (Section 51, Judicial Code)), it will appear that the broad provision that a person might be proceeded against in a civil action in any district in which he might be found was repealed in the provision, in the new legislation, that 'no civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; * * *'. In writing this into section 51, Congress undoubtedly was protecting the individual against process wherever he might be. This language just quoted ends with a semicolon. The statute proceeds thereupon to a limitation of its effect to operate under certain circumstances, and so the statute says:

" 'But where the jurisdiction is founded only on the fact that the action is between citizens of different

states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

"When we bear in mind that Congress is amending a statute which provided that the defendant might be sued in any district in which he is found, the meaning of this provision, it seems to us, is clear. By the old statute the plaintiff could begin an action in the district where he found the defendant, commanding for that purpose the power of the court to cause its own officers to summon the defendant, but this law, of course, compelled the plaintiff to go into the district in which he found his adversary to commence the action. The limitation in section 51 we are considering must, we think, be considered to be, pro tanto, a preservation, under the circumstance provided for, of the right accorded in the Act of 1875, and it should not be construed to give this court a kind of jurisdiction which was not provided for by the act of 1875."

A resident plaintiff in order to obtain territorial jurisdiction over a nonresident defendant must find his adversary within the territorial limits of the district. Counsel lays too much emphasis upon the exclusion of the words "found within the district" from the Acts of 1887-1888. The learned District Judge in the above mentioned case announces the correct rule that the exclusion of such language did not render it any less necessary that the nonresident defendant be found within the district. This opinion is in exact accord with the decision of this Court, *Neirbo v. Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 84 L. Ed. 167, where the Court, addressing itself to that identical question, used the following language:

"The notion that the 1887 amendment, by eliminating the right to sue a defendant in the district 'in which he shall be found,' was meant to affect the implications of a consent to be sued—implications which were the basis of the Schollenberger decision—derives from a misapplication of the purpose of Congress to contract

diversity jurisdiction, based upon a misunderstanding of the legislative history of the 1887 amendment. The deletion of 'in which he shall be found' was not directed toward any change in the status of a corporate litigant. The restriction was designed to shut the door against service of process upon a natural person in any place where he might be caught. It confined suability, except with the defendant's consent, to the district of his physical habitation. In so far as the 1887 legislation sheds any light upon the status of a corporate litigant in diversity suits, its significance lies outside the omission of the 'he shall be found' clause."

It is not absolutely necessary that this Court shall determine that the petitioner is an inhabitant or resident of the Southern District of Mississippi. It is sufficient to say that it was not present within the Northern District, therefore each district had no territorial jurisdiction over the petitioner and the venue was improperly laid.

In *Ex Parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853, the Court used the following language:

"It is unnecessary to inquire whether these several companies were inhabitants of the district. The requirements of the law, for all the purposes of this case, are satisfied if they were found there at the time of the commencement of the suits."

That is to say, the defendant was found within the district where the suit was brought, which is still necessary. The effect of the *Neirbo Case* was to place a foreign corporation doing business in the state, having appointed an agent for service of process, in the same status in respect to territorial jurisdiction as a domestic corporation would be. Its status is equivalent to that of an inhabitant or resident of the state of the district in which it transacts business. *Moss v. Atlantic Coast Line R. Co.*, 2 Cir., 149 Fed. 2d 701; *Schwarz v. Artcraft Silk Hosiery Mills*, 2 Cir., 110 Fed. 2d 465. It

has been definitely decided by this Court that a foreign corporation may only be sued by a resident of the state in the district in which it transacts business.

In our original brief, pages 22-24, we cited a large number of cases announcing the foregoing rule, one of the leading cases being *St. L. S. W. R. Co. v. Alexander*, 227 U. S. 218, 57 L. Ed. 486, 488. The same rule was announced, *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964.

In *Adair v. Employers' Reinsurance Corp.*, (D. C. Tex.), 10 F. Supp. 725, 726, the Court used the following language:

"A foreign corporation cannot be sued in a national court save and except in that district in which it is conducting business. *St. Louis Southwestern R. Co. v. Alexander*, 227 U. S. 218, 222, 33 S. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B, 77.

"A civil suit purely in personam may not go forward against a defendant without either a voluntary appearance or the legal service of process at a place where the officer serving it has authority to do so. A United States District Court cannot issue process beyond the limits of its own district. A defendant cannot be subjected to its jurisdiction in personam by pretended service outside of the district. *Robertson v. Railroad Labor Board*, 268 U. S. 619, 45 S. Ct. 621, 69 L. Ed. 1119."

In *Moore Dry Goods Co. v. Commercial Ind. Co.*, 9 Cir. 282 Fed. 21, 24, the Court used the following language:

"The general rule is that, to support the jurisdiction of a court of the United States to render a personal judgment against a foreign corporation, it is essential, in the absence of consent, that the corporation was, at the time of the service of process, doing business within the district in such a manner and to such an extent as to warrant the inference that through its agent it was found there, and service must be made

upon some agent so far representing the corporation that he may be held in law as an agent to receive process on behalf of his principal. *People's Tobacco Co. v. Am. Tobacco Co.*, 246 U. S. 79, 38 Sup. Ct. 233, 62 L. Ed. 587, Ann. Cas. 1918C, 537; *Toledo v. Hill*, 244 U. S. 49, 37 Sup. Ct. 591, 61 L. Ed. 982; *Phila. & Reading Ry. Co. v. McKibbin*, 243 U. S. 264, 37 Sup. Ct. 280, 61 L. Ed. 710; *St. Louis Southwestern Ry. Co. v. Alexander*, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B, 77; *International Harvester Co. v. Kentucky*, 234 U. S. 579, 34 Sup. Ct. 944, 58 L. Ed. 1479; *Green v. C. B. & Q. Ry. Co.*, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; *Chinn v. Foster-Milburn Co. (D. C.)* 195 Fed. 158; *Michigan Aluminum Foundry Co. v. Aluminum Castings Co. (C. C.)* 190 Fed. 879; *Ladd Metals Co. v. American Mining Co. (C. C.)* 152 Fed. 1008; *Frawley, Bundy & Wilcox v. Pennsylvania Casualty Co. (C. C.)* 124 Fed. 259."

In *Rosenberg Bros. & Co. v. Curtis Brown Company*, 260 U. S. 516, 67 L. Ed. 372, the rule is reaffirmed that a corporation must be subject to service and found in the district in which the suit is brought.

It is the position of respondent's counsel that the Court merely decided that a foreign corporation could not be sued unless it was transacting business in the district, had reference only to the service of process. However, the Court has expressly announced that the foreign corporation must be present, transacting business within the district; that is to say, that the nonresident defendant must be within the territorial jurisdiction of the District Court. Otherwise, there is an absence of territorial jurisdiction and the venue is improperly laid.

Sections 51 and 52, 112 and 113, Title 28 U. S. C. A., since the decision of these cases, have been reenacted without change a number of times, from which it would neces-

cut corporation, filed suit in the United States District Court for the State of Connecticut against a resident citizen of the State of New York and had process issued and served upon the petitioner in the latter state. Objection was made by the petitioner to the jurisdiction over his person upon the ground that he was not present within the district, not served therein, but service was had in the State of New York. The court did say in that case that the petitioner could have no objection to the jurisdiction or venue. The court meant, however, that the petitioner could raise no objection to the jurisdiction because the amount involved exceeding \$3,000.00, the subject matter was one over which the court had jurisdiction, and that the petitioner therefore could have no objection to the venue if he was present within the territorial limits of the jurisdiction or voluntarily appeared in the case. The determining question in the case was as to whether or not the petitioner through the pleadings filed by him and by his conduct entered a general appearance and therefore waived the lack of venue or territorial jurisdiction over him. The court held, however, that lack of personal jurisdiction over the petitioner was properly presented and not waived. The case is not an authority for the announcement of respondent's counsel that venue in the United States District Court is present whenever the plaintiff is a resident of the district where the suit is filed regardless of where the defendant may reside or be found.

In the case last above, the court cited *Lee v. Chesapeake & Ohio R. Co.*, 260 U. S. 653, 67 L. Ed. 443. In that case a non-resident of the State of Kentucky sued the Railroad Company, a non-resident of such state, in a state court in the State of Kentucky. The defendant, Railroad Company, removed the case to the United States District Court for the district wherein the suit was filed, and this Court held the question of venue was waived by the removal of the

case. The court in that case expressly overruled what is known as the *Wisner* case. The court also referred to the case of *Camp v. Gress*, 250 U. S. 308, 63 L. Ed. 997. In that case a non-resident of the State of North Carolina sued three defendants, two of whom were residents of the state, and one a resident of another state, though found within the district of the United States Court where the suit was filed. The court announced the rule that personal jurisdiction could not be obtained over a non-resident defendant unless such defendant was there found within the district or voluntarily appeared, using the following language:

“Ordinarily jurisdiction could be obtained in the district of the plaintiff’s residence only over nonresidents; because all of the defendants must be non-residents in order to satisfy the requirement of diversity of citizenship. And as to these there can be personal jurisdiction only so far as found within or voluntarily appearing within the district.”

The determining question in the case of *Munter v. Weil Corset Company*, *supra*, was as to whether or not the non-resident defendant therein had appeared. If so, jurisdiction and venue were present; otherwise the process was void.

This case involves the construction of Sections 112 and 113, U. S. C. A., Title 28, being Sections 51 and 52, Judicial Code. Section 51 deals with states having only one district and Section 51 is intended to provide where suits may be filed in the United States District Court in states having but one district. The construction of this statute may in no way be modified or influenced by Rule 4(f) of Rules of Civil Procedure or any other rule. The question is presented as to what was intended by Congress as to where the non-resident defendant might be found where suit was brought by a resident of the district. It is clear that if suit is

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 234

MISSISSIPPI PUBLISHING CORPORATION,

vs.

Petitioner,

DENNIS MURPHREE,

Respondent

PETITIONER'S REPLY BRIEF

POINT I

The District Court of the United States for the Northern District of Mississippi had no territorial jurisdiction over the petitioner and therefore the venue was improperly laid.

Respondent's counsel take the position that since the respondent was a citizen of the Northern District of Mississippi that the venue was properly laid and the court had territorial jurisdiction over the petitioner although it could not be found within the territorial limits of the district. Upon the other hand, it is the petitioner's position that although the respondent might be a citizen of the Northern District of Mississippi, no territorial jurisdiction could be obtained over the petitioner unless it was present within the territorial limits of the district.

Counsel rely upon *Munter v. Weil Corset Co.*, 261 U. S. 276, 67 L. Ed. 652. In that case the respondent, a Connecti-

sarily appear that the construction given to the statutes by the Court became part thereof. *Federal Communications Commission v. Columbia Broadcasting System*, 311 U. S. 132, 85 L. Ed. 87; *Oversstreet v. North Shore Corporation*, 318 U. S. 125, 87 L. Ed. 656; *Hecht v. Malley*, 265 U. S. 144, 68 L. Ed. 949; *United States v. Ryan*, 284 U. S. 167, 76 L. Ed. 224; *Johnson v. Manhattan Railway Co.*, 289 U. S. 479, 77 L. Ed. 1331; *Brewster v. Gage*, 280 U. S. 327, 74 L. Ed. 457.

(b) *If the decision of the United States Circuit Court of Appeals in this case be correct, then for the first time in its history Congress in fixing territorial jurisdiction neglected to provide for process to other districts.*

It is petitioner's position that in the passage of Section 51 as well as Section 52, Congress intended that the non-resident defendant should either be present in the district or voluntarily appear: otherwise, the Court would have no territorial jurisdiction over such defendant. It is the further position of petitioner that the territorial jurisdiction of the Court over a defendant may not be in any manner changed, enlarged, diminished, or modified by any rule of Civil Procedure. The question necessarily presents itself as to whether or not the District Court of the Northern District of Mississippi might have had territorial jurisdiction over the petitioner without Rule 4(f). It is conceded in this case that no such territorial jurisdiction was had or could be obtained; in other words, that without Rule 4(f) the Court had no territorial jurisdiction of such defendant.

The United States Circuit Court of Appeals in this case said:

"While the rule affects neither venue nor jurisdiction over the subject matter, it does permit the court

to acquire personal jurisdiction over a defendant in another district within the state in a case like the present—a power that did not exist prior to the adoption of the rules.”

Respondent's counsel concede in brief that without Rule 4(f) personal jurisdiction could not be obtained over the petitioner. However, counsel take the position that prior to Rule 4(f), under the facts disclosed by this record, venue was present in the Northern District of Mississippi but that authority to issue service beyond the district was lacking. At page 18, Respondent's Brief, the following language is used:

“But this choice was more fanciful than real. In practice the choice could be exercised and the plaintiff could sue in the district of his residence only if the corporation was doing business there and had an agent there upon whom process could be served. This was not because of any want of proper venue, but by reason of inability to acquire jurisdiction over the person of the defendant, because process could not run beyond the boundaries of the district, and because process could not lawfully be served upon an agent of the corporation who might be found within the district unless the corporation was actually doing business there.”

We have called the attention of the Court in our original brief, beginning page 46, to the prevailing rule that process may not issue from one district to another in the same state without express authority of Congress, and we call the attention of the Court to the language used in the case of *United States v. Alaska Packers Assn.*, (C. C. A. D. C.) 30 Fed. 2d 564, showing the comparatively few occasions where such permission has been authorized. The latter case also calls attention to the fact that in no case brought to the attention of the Court had such permission been granted in litigation between private persons where a pri-

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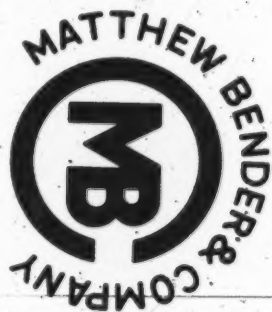
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vate person would have an opportunity to sue the defendant in the district of its domicile, or where it was carrying on business, if a foreign corporation.

Mr. Justice Frankfurter, in dissenting opinion, *Freeman v. Bee Machine Co.*, 319 U. S. 448, 87 L. Ed. 1509, calls attention to various Acts of Congress providing for the issuance of process from one district to another. It will be noted, however, that in every instance where Congress has provided territorial jurisdiction in a district other than that in which the defendant might be found, in the same sentence it has provided for the issuance of process to the appropriate district. This statement alone should be conclusive against the construction sought to be imposed upon Sections 51 and 52 by respondent's counsel, and demonstrate the incorrectness of the decision of the United States Circuit Court of Appeals in this case.

Since Mississippi has two federal districts, territorial jurisdiction over petitioner is fixed in Section 52, 113 U. S. C. A., Title 28. However, the requirement that the non-resident defendant must be found within the district necessarily applies.

Doscher v. United States Pipe Line Co., 185 Fed. 959; *John D. Park & Sons Co. v. Bruen*, 133 Fed. 806; *New Jersey Steel & I. Co. v. Chormann*, 105 Fed. 532; *Goddard v. Mailler*, 80 Fed. 422; *East Tennessee V. & G. R. Co. v. Atlanta & F. R. Co.*, 15 L. R. A. 109, 49 Fed. 608.

Respondent is forced to take the position that the proper venue for this case would at all times have been, under the facts here disclosed, in the Northern District of Mississippi, and the United States District Court for the Northern District of Mississippi would at all times, under the facts here disclosed, have had territorial jurisdiction, but that Congress, for the first time in its history over a period of 150 years, in fixing territorial jurisdiction or venue in a district

other than that in which the defendant could be found, in a moment of absentmindedness, neglected to provide for the issuance of process. We submit that by the failure of Congress to provide for the issuance of process it conclusively appears that it was the intention of Congress that the nonresident defendant, whether individual or corporation, be present within the territorial limits of the district before territorial jurisdiction could be obtained over him. Any other construction is to attribute to Congress a neglect to provide for the issuance of process in such cases and is at variance with its uniform action in such cases. Furthermore, it may be noted that, never in its history, has Congress fixed venue in a district unless defendant was present therein, or the cause of action accrued in such district. In other words, Rule 4(f) of Civil Procedure, as construed in this case, is out of harmony with the entire Congressional history on the subject matter.

(c) *Expressio unius est exclusio alterius.*

Turning to Section 51, 112 U. S. C. A., in certain instances Congress has fixed venue and territorial jurisdiction in the district and provided for the issuance of process to the other districts and even to other states in order to bring a defendant before the Court. In paragraph (b), Congress has fixed venue or territorial jurisdiction in any action brought on behalf of the United States in any district where the defendant is an inhabitant, or where there be more than one defendant in any district where any one of the defendants is an inhabitant, or in any district where the cause of action or any part thereof arose. The paragraph contains appropriate provision for process issuing to other districts or even to other states.

In Section 51, Section 112, U. S. C. A., as amended, Congress has provided venue in a suit by a stockholder on be-

half of a corporation, providing that suit might be brought in the district in which suit against the stockholders might be brought, with provision for process to other districts.

Section 52, being Section 113, U. S. C. A., provides that where there are two or more districts in the state, the venue is fixed in the district where one of them may be found, with process to another district.

Sections 113 to 117, Title 28, U. S. C. A., contain similar provisions where venue is fixed in one district, with provision for process to another district to bring in a defendant not found within the district.

The rule, *expressio unius est exclusio alterius*, is applicable. Congress has provided the circumstances under which territorial jurisdiction is fixed as to a defendant not within the district, whether corporate or individual, and an addition may not be made thereto by Rule 4(f). The effort in this case is to add something to Sections 51 and 52 to the effect that if the plaintiff be a resident of the district and the defendant be a nonresident, that process may issue to any district in the state where the nonresident defendant may be found. By its failure to make such provision, it conclusively appears that Congress had no such intention. The statute may not be added to or diminished by Civil Rules of Procedure, or judicial construction.

In *Camp v. Gress*, 250 U. S. 308, 63 L. Ed. 997, addressing itself to this question, the Court used the following language:

"On the other hand, Section 52 of the Judicial Code makes it clear that the construction contended for by the defendant is unsound. It provides that where a state contains more than one district a suit (not of a local nature) against a single defendant must be brought in the district where he resides; 'but if there are two or more defendants, residing in different districts of the state, it may be brought in either district.' We thus have an express declaration by Congress that,

under one particular set of circumstances, a codefendant may be sued in a district in which he does not reside. *Expressio unius est exclusio alterius.* * * * Congress re-enacted in the Judicial Code this provision expressly permitting, in states having more than one district, *all defendants resident within the state* to be sued in any district thereof in which one of them resides; while it made no similar provision for the case where the several defendants reside in different states. If Congress, in re-enacting the provisions of Section 51, had intended that it should establish a rule with reference to defendants resident in different states, contrary to the construction placed by the overwhelming weight of authority upon the identical provision contained in the earlier statute, it would have expressed that intention in unmistakable language."

In *Goldey v. The Morning News*, 156 U. S. 518, 39 L. Ed. 517, the following language is used, page 518:

"It is an elementary principle of jurisprudence, that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service. Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government. *D'Arcy v. Ketchum*, 52 U. S. 11 How. 165 (13:648); *Knowles v. Logansport Gaslight & Coke Co.*, 86 U. S. 19 Wall. 58 (22:70); *Hall v. Lanning*, 91 U. S. 160 (23:271); *Pennoyer v. Neff*, 95 U. S. 714 (24:565); *York v. Texas*, 137 U. S. 15 (34:604); *Wilson v. Seligman*, 144 U. S. 41 (36:338)."

The purpose of the Judicial Act was to restrict and not enlarge the jurisdiction of the District Courts of the United States.

Rule 4(f) was construed and enforced by the United States Circuit Court of Appeals in this case as to obtain personal jurisdiction over the petitioner, which it could not have had or asserted without such rule. Therefore, it necessarily appears that the jurisdiction of the Court over the person of the petitioner was enlarged by the construction given to Rule 4(f) in this case, which was erroneous.

POINT II

No jurisdiction over the person of the petitioner could be obtained through service on its process agent in the Southern District of Mississippi pursuant to Rule 4(f) of Civil Procedure, since such construction would extend the territorial jurisdiction of the District Court of the United States for the Northern District of Mississippi in violation of Rule 82.

We have called the attention of the court, in the preceding subdivision, to the fact that no Act of Congress has given the district courts general power to send their process beyond the boundaries of their respective districts. In fact, the original general Process Act confines the running of writs within the territorial limits assigned to each district. *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093; *Robertson v. Railroad Labor Board*, 268 U. S. 619, 69 L. Ed. 1119.

We have called the Court's attention to the fact, in limited specific instances, as to Sections 112 and 113, Title 28, U. S. C. A., where venue is fixed within the district, process is authorized to be issued to other districts. We have directed the attention of the Court to the fact that, in a limited number of other instances, Congress has, specifically, fixed venue in one district and authorized process to issue in another district. It is significant, however, that, in no instance, has Congress fixed venue in any district other

than that in which the non-resident defendant might be found, or where the act complained of was committed.

Any such construction of Rule 4 (f), as was held in the Court of Appeals in this case would be in direct conflict with the history of the judiciary act, and amendments thereof, upon this subject. It was decided in this case, and it is now presented to this court, that Rule 4 (f) authorizes general blanket authority for the issuance of process beyond the territorial limits of the district for a defendant or non-resident. Such a construction would have the effect of extending the jurisdiction of the United States District Court of the Northern District of Mississippi over a non-resident defendant beyond the limits of the district.

Since writing our original brief in this case we have examined the Congressional Record showing the action in the House of Representatives and the Senate on the Rules of Civil Procedure. Congress was not required to take any affirmative action, and did not do so.

We attach as *Appendix I* hereto the report of the Judiciary Committee in the House of Representatives on the Rules. We direct the attention of the Court to the report of the Advisory Committee attached to and forming a part of the report of the Judiciary Committee thereupon. We are inserting that part dealing with Rule 4 (f) from which it would appear that the Advisory Committee on Rules for Civil Procedure, in dealing with Rule 4 (f), called attention to acts of Congress expressly fixing territorial jurisdiction, and providing for the issuance of process to another district. We think this information has some interpretative value, in that it was intended to point out that Congress had never, in any instance, provided territorial jurisdiction in a district where the defendant was not present and could not be found but that it, in the same sentence, provided for process to the proper district, and was indicative of an intent on the part of the Committee that Rule 4 (f)

personam has been limited to the district of which defendant is an inhabitant, or in which he can be found." *Robertson v. Railroad Labor Board*, 268 U. S. 619, 627, 69 L. Ed. 1119.

Question of Waiver of Venue by Appointing Agent for Service of Process

Respondent's counsel present to the Court the view that since petitioner has appointed an agent for service of process it has consented to be sued in any court, state or federal, wherever situated in the State of Mississippi. The *Neirbo* case is cited as authority for that position. In that case suit was filed by a nonresident of the state of New York, in the southern district, against a foreign corporation engaged in business in the district, where it had its principal office and place of business. The court did not hold that, by the appointment of an agent for service of process, defendant might sue in any court, state or federal, in the state of New York. Since there was a diversity of citizenship, defendant, for purposes of jurisdiction and venue, was placed in the same status as if it had been a domestic corporation. The right of venue, which it waived, was that of being sued in the state of its creation. The court did not hold that a resident of the state of New York, residing in the Eastern District, would have had the same right to sue Bethlehem unless it was present within the district. This suit is based upon the assertion of right to sue petitioner and obtain service of process upon it in the Southern District, because it has appointed an agent for service of process. Process agents, under state statutes, are limited in their authority to receive process by the state statute providing for such appointment. For many years there has been in force, in the state of Mississippi, a statute requiring foreign insurance companies to appoint the In-

insurance Commissioner of the state as agent for service of process. The statute was under review by this Court in the case of *Morris & Co. v. Skandania Insurance Co.*, 279 U. S. 405, 73 L. Ed. 762. In that case appellants filed suit against a foreign fire insurance company, which had appointed the Insurance Commissioner of Mississippi as its agent for service of process, on a claim accruing beyond the limits of the state. This Court held that the agent for service of process was without authority to serve such process, using the following language:

"The policy sued on was issued, and the loss occurred, in South America. The importation of such controversies would not serve any interest of Mississippi. The purpose of state statutes requiring the appointment by foreign corporations of agents upon whom process may be served is primarily to subject them to the jurisdiction of local courts in controversies growing out of transactions within the state. *Old Wayne Mut. Life Assn. v. McDonough*, 204 U. S. 8, 18, 21, 51 L. Ed. 345, 349, 350, 27 Sup. Ct. Rep. 236; *Simon v. Southern R. Co.*, 236 U. S. 115, 130, 59 L. Ed. 492, 500, 35 Sup. Ct. Rep. 255; *Robert Mitchell Furniture Co. v. Selden Breck Constr. Co.*, 257 U. S. 213, 215, 66 L. Ed. 201, 203, 42 Sup. Ct. Rep. 84; *Louisville & N. R. Co. v. Chatters*, 279 U. S. 320, Ante, 711, 49 Sup. Ct. Rep. 329. The language of the appointment and of the statute under which it was made plainly implies that the scope of the agency is intended to be so limited. By the terms of both, the authority continues only so long as any liability of the company remains outstanding in Mississippi. No decision of the state supreme court supports the construction for which petitioner contends. And, in the absence of language compelling it, such a statute ought not to be construed to impose upon the courts of the state the duty, or to give them power, to take cases arising out of transactions so foreign to its interests. The service of the summons cannot be sustained."

would only apply in cases where Congress had expressly fixed territorial jurisdiction in a district where the defendant was not present and could not be found. Therefore, in the future, where Congress fixes territorial jurisdiction in such a district, it would be unnecessary to provide for the issuance of process. Rule 4 (f) would apply.

We also attach as *Appendix II* to this brief the proceedings in the United States Senate, from which it would appear that the Judiciary Committee of the Senate merely stated that Rule 4 (f) violated Section 112, Title 28, U. S. C. A., 51 Judicial Code. Doubtless, however, Congress was content to take no action thereupon, since Rule 82 became effective at the same time, providing that neither jurisdiction nor venue should be enlarged or diminished by any rule. The rules were intended to provide for process and procedure.

There is nothing in *Moore's Federal Practice*, Vol. I, Page 361, or *Hughes' Federal Practice*, Vol. 17, page 200, or in statements of Members of Advisory Committee, cited in brief of opposing counsel, contrary to the foregoing.

Respondent's counsel, in brief at page 34, quotes Dean Clark, Reporter for the Advisory Committee, and uses the following language:

"The question has been raised whether this is not a substantive change, one affecting jurisdiction and venue. I might say on that, it is our theory that definitely it is not. This is not a matter of either the jurisdiction of the court, what matters the court shall hear and decide, or of the venue, which is the place where certain kinds of action shall be tried. This affects neither one of those points. It simply says that in cases where the district court already has jurisdiction and venue its process may reach as far as the confines of that state itself. In other words, that is why we consider it procedural. It is simply allowing people to be brought before the court within the entire state

and not merely within one District." Proceedings from the Cleveland Institute on the Federal Rules (1938) 205-206.

We invite the Court's attention to a very learned article on "Report of the Advisory Committee," written by Gustavus Ohlinger of the Toledo, Ohio, Bar, published in the November number of University of Cincinnati Law Review. We are attaching to this brief as *Appendix III* section 2 of said article. Mr. Ohlinger presents the view that it was the intent of Congress to limit the term "practice and procedure" in the light of the original and historical development of Federal courts.

In this connection we again refer the Court to *Sewchulis v. Lehigh Valley Coal Co.*, 2 Cir., 233 Fed. 422, cited on page 37 of our original brief, where the following language is used:

"But there is a wide difference between the method of serving a summons and the effect of such service when made. The first relates to the 'form, manner, and order of conducting and carrying on suits.' The effect of the formal act called 'service' is not a question of practice at all, but one of jurisdiction and jurisdiction in turn must be tested by substantive law. The portion of the Revised Statutes under consideration is the successor of the Act of Congress of May 19, 1828, c. 68, Sec. 1, 4 Stat. 278, which declared that 'the forms of mesne process . . . and the forms and modes of proceedings in suits in (certain) courts of the United States . . . shall be the same . . . as are now used in the highest court of original and general jurisdiction of the 7 states in which the federal courts are situated.'"

It was necessary that the district court have territorial jurisdiction of the petitioner. That it could not obtain because petitioner was not present and could not be found within the district. "Jurisdiction of a district court in

Subsequently, the same question was presented to the Supreme Court of Mississippi in the case of *Morris & Co. v. Skandinavia Ins. Co.*, 137 So. 110, 161 Miss. 411. That Court concurred in the conclusion reached by this Court, using the following language:

"Demurrers filed by the appellee to the bill and crossbill were sustained and both were dismissed.

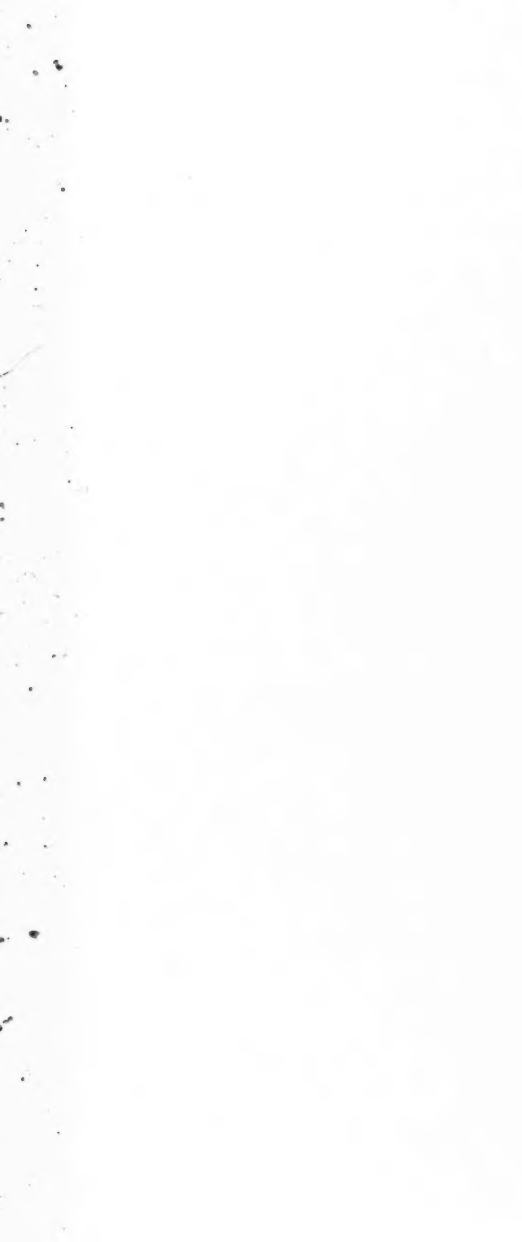
"It appears from the case of *Morris & Co. v. Skandinavia Ins. Co.*, 279 U. S. 405, 49 S. Ct. 360, 73 L. Ed. 762, that the action at law of Morris & Company against the appellee, which was removed to the federal court, finally reached the Supreme Court of the United States, where the judgments of the courts below, quashing the process and dismissing the action were affirmed, on the ground that the statute requiring a foreign insurance company to appoint the insurance commissioner as its agent, upon whom process may be served, does not subject such insurance companies to the jurisdiction of the state courts in controversies growing out of transactions wholly without the state. This interpretation of the statute, and the reason given therefor, meets with our approval, from which it follows that the original bill filed by the state herein is without merit."

From these cases it necessarily appears that the statutes relating to appointment of process agents for service primarily refer to suits filed in the state court and are for the benefit and convenience of citizens of the state. The authority of the process agent in this case to receive process and to bind the petitioner thereby, so as to permit a federal court to take personal jurisdiction of the petitioner, must be measured by the state statute, from which it necessarily appears that decisions of the supreme court of the State of Mississippi are controlling. A statute providing for a process agent is necessarily limited by the state statute of venue. We have directed Your Honors' attention to Section 1433, Mississippi Code of 1942, made Appendix

"D" to original brief, at page 81. We respectfully submit that an agent for service of process, appointed by the petitioner under Mississippi's statute, would have no authority to accept service or bind petitioner by service upon him, except and unless suit was filed in the county provided under state statute, or, if filed in federal court, in a district embracing the county wherein venue is fixed under state statute. This rule necessarily followed in the Supreme Court of Mississippi, *Forman v. Mississippi Publishing Corporation*, 195 Miss. 90, 14 So. 2d 344. In that case suit was filed against petitioner in a county in the Northern District of Mississippi, process issued and served upon petitioner's agent for service of process in Hinds County, Mississippi, where it transacted business and where the cause of action accrued. The Court held that the cause of action accrued in Hinds County, Mississippi, and, since the petitioner had its principal place of business there, suit could be maintained in no other place, which, necessarily, limited the authority of its agent for service of process to receive or be served with process issuing from court provided by state statute.

It is out of this limitation upon the authority of process agent to receive process that there has arisen the rule to which we directed the attention of the Court under Point IV at page 66 of our original brief.

It is very true that the federal jurisdiction, or venue, cannot be controlled by a state statute; however, neither has the federal court any right to extend the authority of the process agent to receive process beyond that necessarily conferred by state statute. The Supreme Court of Mississippi has never held that a process agent had authority to accept service of process except in a suit returnable according to Mississippi venue statutes. Three cases are *Forman v. Mississippi Publishing Corporation*, 195 Miss. 90, 14 So. 2d 344, *Sandford v. Dixie Const. Co.*, 157 Miss.



626, 128 So. 987, *Tri-State Transit Co. v. Mondy*, 194 Miss. 714, 12 So. 2d 920, in which the Supreme Court of Mississippi held that suit against a foreign or domestic corporation could only be filed in the county where cause of action accrued, or in the county where the domestic corporation was domiciled, or the foreign corporation had its principal office and place of business. Domestic and foreign corporations are placed in the same status under venue statute of the State of Mississippi.

In the case of *American Surety Co. v. City of Holly Springs*, 77 Miss. 428, the Supreme Court of Mississippi limited the authority of the process agent to be served with process issued by a Court having jurisdiction. Suit having been filed, however, in the proper county, process may issue to any county for service on the process agent. Residence of the agent for service of process has no relevancy in this case to the venue. Opposing counsel have failed to distinguish the place where suit may be filed from where service may be had upon a process agent. We distinguished the case of *Sandford v. Dixie Const. Co.* and *Tri-State Transit Co. v. Mondy*, cited by respondent, at page 32 of our original brief.

In the case of *Cohen v. American Window Glass Co.*, 2 Cir., 126 Fed. (2d) 111, the Court uses the following language at page 113:

"This trend toward allowing state law to govern jurisdiction and venue over foreign corporations reached its furthest step in *Neirbo Co. v. Bethlehem Shipbuilding Corp.* 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167, 128 A. L. R. 1437, where a designation of agent under state law was a waiver of federal venue."

Counsel cite *Iser v. Brockway* (D. C. Penn.), 25 Fed. Supp. 221. In that case it was held that any suit brought against a nonresident motorist for injury to another, where

it was provided that service might be had on the Secretary of State, should be brought in the United States District Court embracing the county where the cause of action accrued.

Counsel cite *Williams v. James* (D. C. La.), 34 Fed. Supp. 61. We distinguished that case in our original brief, page 61. It is significant, however, in this connection, that the court held that the defendants had contracted, under the Louisiana statute, that they might be sued in the state court in the parish where cause of action accrued and that the district court in the instant case embraced such parish. The Court used the following language:

"The state legislation and the consent of the defendant motorist have brought about a state of facts authorizing this United States court to take cognizance of the case and of his person. *Ex Parte Schollenberger*, 96 U.S. 369, 377, 24 L. Ed. 853; the *Neirbo* case, *supra*; *Oklahoma Packing Co. et al. v. Oklahoma Gas & Electric Co., et al.*, 10 Cir., 100 F. 2d 770.

"Similarly, as in this Oklahoma case, the situs of the accident in the instant case is in a parish (county) within the federal district and the state law of Louisiana provides for suit in the district court of the parish wherein the accident occurred. Louisiana Code of Practice, Art. 165, Sec. 9."

Counsel cite the case of *Mass. Bonding & Ins. Co. v. Concrete Steel Bridge Co.*, 4 Cir., 37 Fed. 2d 695. This case was distinguished in our original brief, page 60. In this connection it might be noted, that suit was filed in the district court embracing the county where cause of action accrued, and where, under the state statute, the agent for service of process had authority to receive service.

The case of *Coastal Club v. Shell Oil Co.*, 45 Fed. Supp. 859, was distinguished in our original brief, page 61.

The last three cases turned upon the question as to whether or not venue, having been properly laid, service of

process might be had when made upon an agent for service of process in another district.

In the case of *Barnes v. Wilson* (D. C. Wis.), 40 Fed. Supp. 689, cited by respondent, the plaintiff was a resident of California, an individual. Edna L. Wilson was a resident of the Western District of Wisconsin and the Mutual Life Insurance Company, one of the defendants, had its principal office and place of business in the Eastern District of Wisconsin. The suit was filed in the Eastern District of Wisconsin and the Court held, very properly, that the plaintiff had the right, since there were two districts in the state, to file suit in the district of either defendant, and that the residence of the agent for service of process was of no importance, using the following language:

"It is quite certain that this section does not purport to limit the venue of any action which might be brought to the particular locality in which the commissioner happened to reside. The 'consent' to be sued is Statewide. * * * *Oklahoma Packing Co. et al. v. Oklahoma Gas & Electric Co.*, 309 U. S. 4, 6, 7, * * * 84 L. ed. 537 * * *"

It appears in that case suit was filed in the district court of the United States in the district embracing the county where the cause of action accrued and suit was required to be filed under state statute.

Counsel cite *Zwerling v. New York & Cuba Mail S. S. Co.* (D. C. N. Y.), 33 Fed. Supp. 721. Suit was filed in the Eastern District of New York. The court held that suit should have been filed in the Southern District where defendant's principal place of business was located, but that defendant had entered general appearance. The case supports petitioner's view.

Counsel cite *Salvatori v. Miller Music, Inc.*, 35 Fed. Supp. 845. This case is discussed in petitioner's original brief, page 63.

We have distinguished the case of *O'Leary v. Loftin* (D. C. N. Y.), 3 F. R. D., 36, in original brief, page 62.

Counsel cite *Green v. C. B. & Q. Ry. Co.*, 205 U. S. 530, 51 L. Ed. 916, cited in petitioner's original brief, page 23. The case is not authority for respondent's position that venue was lacking in the district where suit was brought merely because of inability to procure service upon defendant therein. The Court announced the well-established rule that a suit could not be maintained against a foreign corporation except in the district where it transacted business.

We respectfully submit that Petitioner had not consented to be sued in the Northern District of Mississippi and that Court had no territorial jurisdiction of petitioner and suit was properly dismissed.

Substantive Rights of Petitioner

In our original brief, page 52, we presented to the Court the view that the construction given to Rule 4(f) by the United States Circuit Court of Appeals in this case would violate the substantive rights of the petitioner. It is no answer to the argument to say that the rules were submitted to Congress and were adopted. As we have heretofore pointed out, Congress took no affirmative action and it could not delegate its legislative authority. See the case of *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 79 L. Ed. 1570. The question as to whether or not a substantive right of petitioner was invaded presents a judicial question for this Court to determine. *United States v. Sherwood*, 312 U. S. 584, 85 L. Ed. 1058; *Sibbach v. Wilson & Co.*, 312 U. S. 1, 85 L. Ed. 479; *Harrison v. Schaffner*, 312 U. S. 579, 85 L. Ed. 1055.

We reaffirm the view presented to the Court in our original brief and lay emphasis upon the proposition that the right of petitioner, when sued alone in a transitory

action, to be sued in the district where it is an inhabitant or it may be found, is a substantive right. It should not be required to go two hundred miles to defend in the Northern District an action which arose in the Southern District where it has its only place of business in the state and where its officers, agents and servants reside and where the petitioner's books and records are kept and its corporate functions in Mississippi are exercised in the Southern District of Mississippi.

In 67 C. J., Subject "Venue", Section 155, page 97, the following language is found:

"The privilege conferred on a defendant of being sued in the county of his domicile is a valuable and substantial right, which is not to be denied upon a strained or doubtful construction of a statutory exception or except in strict compliance with the law on clear and convincing proof, and all doubts are to be resolved in its favor."

In the case of *Shelton v. Southern Kraft Corporation*, (S. Car.), 10 S. E. (2d) 341, 129 A. L. R. 1280, 1284, the Court used the following language:

"There is the prevailing evidence that defendant, a foreign corporation, maintains its only mill and offices for the transaction of the business of the corporation in Georgetown County. The right of a defendant to have a case against him tried in the county in which he resides is a substantial right."

POINT III

Respondent was not a citizen or resident of the Northern District of Mississippi.

We presented this question in original brief under Point V, page 68. Respondent's counsel does not controvert the statement of facts therein contained. Petitioner's motion

to dismiss was not heard on oral testimony before the District Judge, but upon certain affidavits submitted by petitioner and a counter-affidavit on behalf of respondent. The question as to whether respondent was a citizen and resident of the Northern District of Mississippi, therefore, is a matter of law appearing upon the face of the record. The burden of proof was upon respondent affirmatively to establish requisite residence, to bring himself within the jurisdiction of the court.

In the case of *Paul V. McNutt, Governor of the State of Indiana v. McHenry Chevrolet Co.*, 298 U. S. 190, 80 L. Ed. 1141, 1142, the Court uses the following language:

"Respondent contends that the burden of proving the lack of jurisdiction rested upon those challenging the jurisdiction. We have considered and overruled the similar contention in our opinion in *McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178, ante, 1135, 56 S. Ct. 780, supra. In this aspect we find no substantial difference between the two cases."

In the case of *Carl Wilhelm Baumgartner v. United States*, 322 U. S. 665, 88 L. Ed. 1525, the Court held that while ordinarily it would accept concurring conclusions of the District Court and the United States Circuit Court of Appeals, that it would, however, have to examine and determine the basic essential fact. The same conclusion was reached by the Court in the case of *Universal Oil Products Co. v. Globe Oil & Refining Co.*, 322 U. S. 471, 88 L. Ed. 1399.

In *Crites v. Prudential Ins. Co. of America*, 322 U. S. 408, 88 L. Ed. 1356, the Court reversed the decree having the approval of the District Court and the United States Circuit Court of Appeals because the record presented an error of law.

In the case of *District of Columbia v. Murphy*, 314 U. S. 441, 86 L. Ed. 329, dealing with the same question, the Court reversed the District Court and the Court of Appeals of the District of Columbia, using the following language:

"On the other hand, we hold that persons are domiciled here who live here and have no fixed and definite intent to return and make their homes where they were formerly domiciled. A decision that the statute lays a tax only on those with an affirmative intent to remain here the rest of their days would be at odds with the prevailing concept of domicile, and would give the statute scope far narrower than Congress must have intended. Cases falling clearly within such broad rules aside, the question of domicile is a difficult one of fact to be settled only by a realistic and conscientious review of the many relevant (and frequently conflicting) indicia of where a man's home is and according to the established modes of proof. The place where a man lives is properly taken to be his domicile until facts adduced establish the contrary. *Ennis v. Smith*, 14 How. (US) 400, 423, 14 L. Ed. 472, 482; *Anderson v. Watt*, 138 U. S. 694, 706, 34 L. Ed. 1078, 11 S. Ct. 449. The taxing authority is warranted in treating as prima facie taxable any person quartered in the District on tax day whose status it deems doubtful. It is not an unreasonable burden upon the individual, who knows best whence he came, what he left behind, and his own attitudes, to require him to establish domicile elsewhere if he is to escape the tax."

Respondent, in taking advantage of the Mississippi Homestead Exemption Act, which entitled him to exemption from taxation on his homestead in Jackson, Mississippi, made solemn oath that he was a resident of Jackson, Mississippi, in the Southern District of Mississippi. He was not entitled to exemption unless his home was in the City of Jackson. We attach as *Appendix IV* copy of Section 9723, Mississippi 1942 Code, stating the conditions upon

which a taxpayer is entitled to the exemption provided under the Act for his home, and also, as *Appendix V*, Section 9729, Mississippi 1942 Code, making it the duty of applicant to give a true statement of the facts in his sworn application, where the following language is used:

“(n) All of the information given in the application must be true and correct, and must be supplied by the applicant in the event he does not prepare the application with his own hand. The answer to questions and the information given on the application must not be made or inserted by the assessor or by anyone except as furnished by the applicant himself or herself;

“(o) The application shall be made personally by the applicant, or may be made by his or her agent or attorney duly constituted in writing if a copy of such written authority, duly sworn to and acknowledged or attested by two competent witnesses, be attached to each the original and duplicate application for homestead exemption;

“(p) The application must bear an affidavit by the applicant to the truth of all statements contained therein, and the affirmation may be administered by the tax assessor, a member of the board of supervisors, or any other officer authorized by law to take acknowledgments.”

It is conceded that respondent had resided and owned his home in Jackson, Mississippi, for approximately 24 years. During that time he had been several times elected Lieutenant-Governor of Mississippi, which office only required his presence in the City of Jackson three or four months in the year bi-annually. For a period of eight years he held no state office whatever. During all that period, however, he was not only residing in Jackson but was engaged in a gainful occupation. Respondent's answer (R. 31), contains all information with respect to his

intention to return to Calhoun City, Mississippi. The following language is used:

"The affiant built and furnished, ready for immediate occupancy, a house in the town of Pittsboro in 1939, on a lot in said town, on which he was born, to which he intends to return as his permanent home. Said home consists of three bedrooms, a kitchen, a living room, a bathroom, and it has a screened porch in the front and rear, and has installed in it modern electrical equipment suitable for use as a home and for no other purpose. In 1942 this affiant purchased a cemetery lot in the town of Pittsboro, for the purpose of supplying himself with a place of burial."

We respectfully submit that respondent's counter-affidavit did not even show a floating intention of returning to Calhoun City, Mississippi.

In the case of *Gilbert v. David*, 235 U. S. 561, 59 L. Ed. 360, *supra*, the Court used the following language:

"But, as we have seen, a floating intention of that kind was not enough to prevent the new place, under the circumstances shown, from becoming his domicile. It was his place of abode, which he had no present intention of changing; that is the essence of domicil."

The Supreme Court of Mississippi, in determining what is meant by "resident," used the identical language in the case of *Bank of Cruger v. Hodge*, 189 Miss. 356, 198 So. 26.

Counsel cite the cases of *United States v. Chemical Foundation*, 272 U. S. 1, 71 L. Ed. 131; *United States v. McGowan*, 290 U. S. 592, 78 L. Ed. 522; *Alabama Packing Co. v. Ickes*, 302 U. S. 464, 82 L. Ed. 374; *General Talking Picture Corp. v. Western Electric Co.*, 304 U. S. 175, 82 L. Ed. 1273, wherein it is held that the Court would not review concurrent findings of the two lower Courts. In each of these cases, however, it appears that the decree appealed from was supported by substantial evidence.

Respondent's counsel cite, dealing with the question of residence, several cases from the Supreme Court of Mississippi. It will not be necessary for us to review the cases since they are all controlled by the more recent cases, *Bank of Cruger v. Hodge*, 189 Miss. 356, 198 So. 26; *Ritter v. Whitesides*, 179 Miss. 706, 176 So. 728. In our original brief, page 71, reference to each is made.

The United States Circuit Court of Appeals in its opinion stated that petitioner should have taken a cross appeal from the opinion of the District Judge holding that respondent was a resident of the Northern District. It is hornbook law that a successful litigant has no right of appeal as to a judgment in its favor.

We respectfully submit that the decision of the United States Circuit Court of Appeals should be reversed and that of the District Judge affirmed.

Respectfully submitted,

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APPENDIX I

House of Representatives, 75th Congress, 3d Session.
Rept. 2743

RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES

Mr. Summers of Texas, from the Committee on the Judiciary, submitted the following report:

"The Committee on the Judiciary, to whom was referred the proposed Rules of Civil Procedure for the District Courts of the United States, adopted by the Supreme Court as authorized by the act of June 19, 1934, chapter 651, and published as House Document 460, Seventy-fifth Congress, third session, have conducted public hearings and have given thorough consideration to the purpose of each of the said rules, and respectfully recommend that same be permitted to take effect as provided in the statute aforementioned.

Conformable to section 2 of the act, the Supreme Court, by order entered June 3, 1935, understood—

"The preparation of a unified system of general rules for cases in equity and actions at law in the district courts of the United States, so as to secure one form of civil action and procedure for both classes of cases, while maintaining inviolate the right of trial by jury in accordance with the seventh amendment of the Constitution of the United States, and without altering substantive rights."

To assist in the undertaking, the Court appointed an advisory committee of distinguished lawyers and law teachers. Several drafts of the proposed rules were formulated and distributed widely among the judges of the various courts, committees of lawyers, bar associations, and individual members of the legal profession, with the object of obtaining the largest possible interest and the greatest number of suggestions for the perfecting of the work, not only as to substance but also as to form and method of expression. Copious notes explaining each of the rules were presented

to the Committee on the Judiciary, and have been published (H. Doc. No. 588, 75th Cong. 3d, Sess.) for the information and use of the bench and bar. These notes reflect the prodigious effort invested in bringing the rules to their final form and text.

In the hearings, published by the Committee on the Judiciary, members of the advisory committee, groups especially concerned with the practical operation of the rules, and witnesses representing different shades of opinion on the subject appeared and were heard; and letters and recommendations from bar-association committees and individual practitioners of the law were presented and read. The committee reached the conclusions herein expressed.

Two questions were raised with reference to which it was determined there should be an expression of the views of the committee as an aid in the interpretation of the rules in question.

The first question was raised orally at the hearing by Judge Joseph Padway, general counsel for the American Federation of Labor, by Merle Vincent, counsel for the International Ladies' Garment Workers Union, Committee for Industrial Organization affiliate; and by a letter filed with the Judiciary Committee by Lee Pressman, general counsel of the Committee for Industrial Organization. They were concerned that the language of rule 4 (d) (3) providing for service of summons upon an unincorporated association "by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process," might on account of the relations of central and affiliated labor organizations, be construed as intended to permit service of a summons upon an officer, etc., of an affiliated organization which would be binding upon the central body.

The other question was raised by Messrs. Padway and Vincent orally at the hearing. Rule 65 (c) provides in part as follows:

"These rules do not modify the act of October 15, 1914, chapter 323, sections 1 and 20 (38 Stat. 730) United States Code, title 29, Sections 52 and 53, or the act of March 23,

1932, chapter 90 (47 Stat. 70), United States Code, title 29, chapter 6, relating to temporary restraining orders and preliminary injunction in actions affecting employer and employee."

The apprehension here was that the phrase "relating to temporary restraining orders and preliminary injunctions", might be construed as preserving from change only the provisions of the enumerated acts dealing with temporary restraining orders and preliminary injunctions.

The Committee on the Judiciary suggested that the quoted phraseology in these two rules be considered at a conference between the representatives of the three mentioned labor organizations and of the Supreme Court advisory committee, so that any source of possible difficulty arising from the language used might be avoided. This suggestion was assented to. The conference was held and it was agreed that all doubts as to the meaning of the language used, raised by the representatives of the labor organizations, would be removed by adding to the notes to rule 4 (d) (3) and rule 65 (e) of the notes to the rules of civil procedure prepared under the direction of the advisory committee, the following:

"This enumerates the officers and agents of a corporation or of a partnership or other unincorporated association upon whom service of process may be made, and permits service of process only upon the officers, managing or general agents, or agents authorized by appointment or by law, of the corporation, partnership, or unincorporated association against which the action is brought. (See *Christian v. International Ass'n of Machinists*, 7 E. (2d) 481 (D. C. Ky., 1925) and *Singleton v. Order of Railway Conductors of America*, 9 F. Supp. 417 (D. C., Ill., 1935). Compare *Operative Plasterers' and Cement Finishers' International Ass'n of the United States and Canada v. Case*, 93 F. (2d) 56 (App., D. C., 1937)."

To the note to rule 65 (e):

"The words 'relating to temporary restraining orders and preliminary injunctions in actions affecting employer

and employee' are words of description and not of limitation."

The Committee on the Judiciary has considered the additional notes and believe that they state the correct interpretation and construction of the respective rules.

The investigation made by the Committee on the Judiciary is convincing that the Supreme Court and its advisory Committee painstakingly have collected and compared the practice codes and rules in each of the States of the Union, in England and Canada, and, in principle, have selected the best features of present-day court procedure.

The rules not only will be the norm of practice in the Federal district courts, but it is believed will furnish a model to which State practice will tend to conform.

As has been said: "The principle underlying the rules of court is the organic one of an equitable division of power between the legislative and judicial departments of Government. It is the very spirit of the Constitution."

The manner of bringing parties into court and the course of courses thereafter require a well-defined set of rules designed to expedite the administration of justice by the simplification of procedure and the standardization of forms for the ready use of court and counsel. These rules concern only the practice, the method by which the causes shall be presented to court and jury, and the details of practical mechanical operation.

The conferring of power on the Supreme Court by statute to prescribe rules of practice is not a new departure. Statutory authority for the adoption of rules of court began with the Judiciary Act of 1789, and from time to time other acts of Congress have confirmed the rule making power in courts. In the year 1912, the Supreme Court of the United States promulgated a revision of the Federal Equity Rules, which have met with general approval. Those rules now presented to Congress, and although the proposed rules are united, the union is one of procedure only, every legal and equitable right and remedy continues unimpaired.

It is confidently expected that the adoption of the new rules will materially reduce the uncertainty, delay, expense, and the likelihood that cases may be decided on technical

points of procedure which had no relation to the just determination of the controversy on its merits. The waste of judicial time on the questions of practice, the intricacies of Federal jurisdiction, the survival of the obsolete wall between law and equity in procedure and the bewildering effect of the numerous exceptions to the Conformity Act which none but experts can understand made the Federal courts unfavorable forums for the ordinary litigant and the general practitioner.

It should be emphasized that any and all of the rules of procedure are subject to modification or repeal by Congress. Furthermore, it is the opinion of the committee that amendments made by the Supreme Court to the united rules must be submitted to Congress in accordance with the method prescribed for submitting the original rules, i. e., they must be submitted to Congress by the Attorney-General at the beginning of a regular session and will not go into effect until after the close of that session.

Experience in the operation of the new rules should disclose the need for changes from time to time, and only by practical experience can the necessity for changes be determined. A single uniform system of procedure under which the lawyers in every locality may practice with equal facility in the National and State courts is altogether desirable. The proposed rules, which thousands of the bar and hundreds of the bench have helped to frame, undoubtedly are an important step toward an ideal system; and the Committee on the Judiciary expresses appreciation of the splendid services of the Supreme Court of the United States and its advisory committee in a noteworthy achievement, a signal advance along the pathway of justice, and a landmark in the history of American Jurisprudence.

EXCERPTS FROM THE NOTES TO THE RULES OF CIVIL PROCEDURE
FOR THE DISTRICT COURTS OF THE UNITED STATES CONCERN-
ING RULES 4 (F) AND 82

Notes prepared under the direction of the Advisory
Committee on Rules for Civil Procedure appointed by
the Supreme Court of the United States.

Note to Subdivision (f) of Rule 4.

"This rule enlarges to some extent the present rule as to where service may be made. It does not, however, enlarge the jurisdiction of the district courts.

U. S. C., Title 28, Sections 113 (Suits in States containing more than one district) (where there are two or more defendants residing in different districts in same state), 838 (Executions run in all districts of state: U. S. C., Title 47, Section 13 (Action for damages against a railroad or telegraph company whose officer or agent in control of a telegraph line refuses or fails to operate such line in a certain manner—"upon any agent of the company found in such state")); U. S. C., Title 49, section 321 (c) (Requiring designation of a process agent by interstate motor carriers and in case of failure so to do, service may be made upon any agent in the state) and similar statutes, allowing the running of process throughout a state, are substantially continued.

U. S. C., Title 15, Sections 5 (Bringing in additional parties) (Sherman Act); 25 (Restraining violations; procedure); U. S. C., Title 28, Section 44 (Procedure in certain cases under interstate commerce laws; service of processes of court), 117 (Property in different states in same circuit; jurisdiction of receiver), 839 (Executions; run in every State and Territory) and similar statutes, providing for the running of process beyond the territorial limits of a state, are expressly continued."

RULE 82. Jurisdiction and Venue Unaffected.

"These rules grant extensive power of joining claims and counterclaims in one action, but, as this rule states, such grant does not extend federal jurisdiction. The rule is

declaratory of existing practice under the Federal Equity Rules with regard to such provisions as Equity Rule 26 on Joinder of Causes of Action and Equity Rule 30 on Counterclaims. Compare Shulman and Jaegerman, "Some Jurisdictional Limitations on Federal Procedure", 45 Yale L. J. 393 (1936)."

APPENDIX II

From Volume 83, Part 8, Congressional Record, 75th Congress, 3rd Session, June 8, 1938

"The Senate Committee on the Judiciary to whom was referred the joint resolution (S. J. Res. 281) to postpone the effective date of the Rules of Civil Procedure for the District Courts of the United States, after consideration thereof, report the same favorably with the recommendation that it do pass.

The Rules of Civil Procedure for the District Courts of the United States were presented to the Congress on January 3, 1938 by the Attorney General.

These rules prescribe the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. They purport to unite the rules for cases in equity with those in actions at law and will take effect upon September 1, 1938, or three months subsequent to the adjournment of this session of Congress. The rules are intended to have the force and effect of repealing and superseding numerous acts of Congress now on the statute books, and innumerable questions will arise as to the exact extent of the conflict.

If Congress takes no action on the proposed rules, they will take effect, leaving hundreds of laws, enacted by Congress during the past century, still on the statute books, some of which undoubtedly are in conflict with many of the provisions of the rules. The result obviously will be uncertainty as to whether the rules or the statutes are to prevail. The act under which the rules were drawn does not provide for any action by Congress, but, as indicated, merely declares that the rules shall be submitted to Congress; and, in addition, provides (or is interpreted to provide) that when

adopted all acts of Congress heretofore passed, and possibly to be enacted hereafter, i.e., regulating practice in the Federal Courts, shall no longer be in effect.

It is the opinion of many that this will result in great confusion and instead of simplifying procedure will greatly complicate it. It is possible that in nearly every case the attorneys will be required to ascertain whether or not they have complied with the rules and the applicable statute to see whether there are conflicts or whether there may be conflicts. This means that the attorneys must select one or the other course at their peril, and so in many cases the question will have to be submitted to the court for decision. As an example, the statute that requires that the practice in the Federal courts shall conform to the State practice (the so-called Conformity Act). Would it not be better in order to avoid confusion to repeal the Conformity Act directly and not have it nullified by some promulgation of rules of court which repeal it by implication?

As stated, the rules will soon go into effect. There has been no opportunity by the Judiciary Committee of the Senate to study the rules and their effect upon statutes; and it would seem, in view of the importance of the questions involved, that a thorough study should be made by Congress before the rules become effective. This may not be done during the few weeks remaining of the present session.

The joint resolution recites some of the reasons why the effective date of the proposed rules shall be extended to the adjournment of the first session of the Seventy-sixth Congress. If this extension is given, full opportunity will be afforded for a thorough study and examination of the rules.

For these reasons, briefly stated, the Committee on the Judiciary of the Senate recommend that Senate Joint Resolution 281 do pass.

Herewith is submitted a memorandum briefly presenting reasons in behalf of the adoption of the resolution.

Memorandum

It can readily be seen that if Congress is to complete its work and establish effectively a simplified system of practice in the Federal Courts combining law and equity, it should

make the statutes conform to the rules. This may not be a difficult task. In many cases the statute may be amended by substituting for the special procedure outlined in the statute, a provision that the procedure shall be as provided in the rules of court. This will settle a question that is bound to be the subject of interminable litigation, that is, whether a statute is substantive law or merely procedural. If substantive law, the rules cannot repeal it for there is no authority to change substantive law. This is provided in the statute authorizing the making of rules.

But what is "substantive law" as distinguished from "practice and procedure", which are proper subjects of rules of court? Certain it is that courts may well differ on what is "substantive law" and what is "procedure" in many of the rules. Certain it is that Congress enacted numerous statutes, found in the Judicial Code and its amendments, that were considered by Congress as affecting "substantive rights" and not merely the making of rules of court.

It has been held that many steps in a trial, which have offhand seemed to be merely matters of practice, such as the matter of charging the jury whether orally or in writing, the submission of interrogatories, the submission of a special verdict, the power of a court to set aside a judgment after term, the power of a court to vacate its findings and grant a voluntary nonsuit, are none of them matters of "practice and procedure".

Many of the rules contain provisions as to which there will be interminable dispute on the question whether they affect substantive rights or are merely procedural.

All this suggests the advisability of a careful study of all the statutes that are affected by the new rules. The committee of the bar association which proposed the rules has prepared a pamphlet which contains a comment on each rule and, in most instances, a reference to the statute intended to be nullified or modified or affected in some way. This pamphlet may serve as a guide in revamping the Judicial Code so as to harmonize it with the rules and avoid a vast number of questions concerning construction. This work cannot be completed in the remaining days of the present Congress. The draft of the "comments" to

which reference is made has not yet been printed in final form. The House committee has not yet printed its hearings and has not yet made a report.

It is clear that a much finer work and one more satisfactory to the bar of the country can be performed if the Congress will postpone the effective date of the new rules so as to afford an opportunity to avoid the confusion resulting from conflicts between the rules of court and the acts of Congress. The resolution suggests a date at the end of the next session. The one point it is desired to emphasize is that Congress should have an opportunity to act upon the proposals for the modifications and corrections of the statutes, instead of leaving the statutes providing for one thing and the rules of court another, because of inaction by Congress, and allowing the rules to go into effect within a few weeks.

Some of the Conflicts and Uncertainties Resulting from Adoption of the Rules Without Modifying The Statutes

(1) Rule 26 relating to mode of proof as distinguished from "Practice and Procedure." Conflicting statute 28 U. S. C. Sec. 635 (Judicial Code).

(2) Rule 57 affecting remedies. Conflicting statute 28 U. S. C. sec. 400, Declaratory Judgment Act, and sec 256 N. Y. 298.

(3) Rules 38 (a) and 38 (d) affecting right to trial by jury. Conflicting statute 28 U. S. C. sec. 773 Judicial Code. United States Constitution, art. III, sec. 2; 52 U. S. (11 Howard) 669.

(4) Rule 4 (f) enlarging power to issue process. Conflicting statute 28 U. S. C. sec. 112; Toland v. Sprague, 12 Peters (37 U. S.) 300.

(5) Rule 6 (c) and rule 59 (b), powers of courts after term. Conflicting statutes, see Bonson v. Schutten, 104 U. S. 410.

(6) Rule 43 (b) and rules 26, 31, 33, 34, unlimited right of discovery. Conflicting statutes, 28 U. S. C. sec. 636

Judicial Code; Hanks, etc., v. International Co., 194 U. S. 303.

(7) Rule 35, physical examination of persons. Conflict see 113 U. S. 717; Union Pacific Co. v. Botsford, 141 U. S. 250; Rev. Stat. sec. 861, 863, et seq. Rev. stat. sec. 724, 28 U. S. C. 635 et seq., Judicial Code.

Article IX, Sec. 43—Oklahoma Statutes annotated:

“Foreign Corporations—Conditions of doing business—Service—Place of Suit. No corporation, foreign or domestic, shall be permitted to do business in this State without first filing in the office of the Corporation Commission a list of its stockholders, officers, and directors, with the residence and postoffice address of, and the amount of stock held by each. And every foreign corporation shall, before being licensed to do business in the State, designate an agent residing in the State; and service of summons or legal notice may be had on such designated agent and such other agents as now are or may hereafter be provided for by law. Suit may be maintained against a foreign corporation in the county where an agent of such corporation may be found, or in the county of the residence of plaintiff, or in the county where the cause of action may arise.”

APPENDIX III

II. WHAT IS THE SCOPE OF THE POWER WHICH THE ACT OF JUNE 19, 1934 CONFERS ON THE SUPREME COURT?

All this, however, finally leads into the second question, namely, the scope of the power which the Act of June 19, 1934, confers on the Supreme Court. Here the initial recourse must, of course, be to the act itself. It provides that:

“ . . . the Supreme Court of the United States shall have the power to prescribe, by general rules for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings,

and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. * * * It further provides that:

"The court may at any time unite the general rules prescribed by it for cases in equity and those in actions at law so as to secure one form of civil action and procedure for both: Provided, however, That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate * * *"

The words "the forms of process, writs, pleadings, and motions" occasion no difficulty. Everyone is familiar with the terms "process," "writs," "pleadings," "motions," and "forms". The regulation of these "forms" and the making of rules "directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description" belong to the courts and do not involve the exercise of legislative functions. The enumeration necessarily includes the time and manner of making returns and of preparing and filing pleadings and other papers. These are all matters of detail in judicial administration.

So far we are on safe ground. Whether, on the other hand, the Supreme Court can go beyond this is the serious question. On familiar canons of statutory construction it can well be argued that it was the intent of Congress to limit the general term "practice and procedure" to particulars of the kind set out in the preceding enumeration, that is, to matters *ejusdem generis* as "forms of process, writs, pleadings and motions" and that the general term cannot be extended to include matters of jurisdiction, power, modes of proof, rules of evidence and substantive law.

The Conformity Act uses some of the same terms, though in a different order, namely,

"The practice, pleadings, and forms and modes of proceeding in civil causes * * * shall conform * * * to the practice, pleadings, and forms and modes of proceeding

existing at the time in like causes in the courts of record of the state”

If anything, the order in which the words are used in the Conformity Act permit of a wider scope for the initial term, “practice”, nevertheless, in applying the Conformity Act it has been held that the Declaratory Judgment Law of Kentucky is not a matter of “practice, pleadings, and forms and modes of procedure;” that the manner of charging the jury, whether orally or in writing, the submission of interrogatories, the submission of a special verdict, the calling of a party for cross-examination under a state statute, the manner of perfecting, settling and signing a bill of exceptions, the power of a court to set aside a judgment after term, the power of a court to vacate its findings and orders during term and to grant a voluntary nonsuit—are none of them matters of “practice and procedure.”

Finally, the Act, in its second section, provides that the court

“ . . . may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both.”

The word “unite,” as used in the Act, plainly refers to the rules prescribed for actions at law and for suits in equity respectively. The rules may be united—but that does not mean that the distinction between equity and law is to be obliterated, as the report, possibly through inaccurate expression, seems to infer when it says of Rule 2, that it supersedes United States Code, Title 28, Section 384,—the section which has been in the federal statutes since the Judiciary Act of 1789, and provides that “suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law.” In fact, this old enactment codified the distinction as it was known and as the Constitution recognized it in 1787, and as it has persisted in the constitutional courts to this day. Neither statute nor rule can obliterate it.

However, the scope of the Act, particularly of the words “practice and procedure,” should not be left solely to con-

siderations of statutory construction, for it is true here, as Justice Holmes remarked in deciding whether an estate tax should be classified as a direct tax, or as an indirect tax, that "a page of history is worth a volume of logic." An examination of the origin and historical development of the system of constitutional courts will show that the words practice and procedure have, from the first, had a meaning which is really inherent in the scheme of government by separate legislative, executive and judicial departments provided in the Constitution.

Many of the framers of the Constitution were members of the first Congress and took part in drafting the first judiciary act, the famous Judiciary Act of 1789. For this reason the Supreme Court has frequently referred to the act as "a contemporary interpretation of the constitution of the most forcible nature" and as "a practical exposition too strong and obstinate to be shaken". According to some scholars, the act has been "smothered in praise" and acclaimed as "probably the most important and the most satisfactory act ever passed by Congress." A detailed study of its provisions should, therefore, both from the historical standpoint and from the standpoint of logic, aid in running the line that should separate the functions of the legislative and judicial departments in providing for the administration of justice.

We go, then, to this enactment of the first Congress which remains to this day the foundation structure of our system of constitutional courts within the states.

After providing for the organization of the Supreme Court, of the district courts and of the circuit courts, and for their territorial venue and terms, the act in logical progression provides for

1. The jurisdiction of the courts. Sections 9, 10, 11, 12, 21, 22, and 25 confer upon the Supreme Court, the circuit courts and the district courts, their respective jurisdictions.

2. The power of the courts. Sections 13, 14, 15, 17, 18 and 30 confer that power. Section 13 confers power on the Supreme Court.

... to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and mari-

time jurisdiction; and writs of mandamus, in cases warranted by the principle and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

This is the clause that gave Chief Justice Marshall his opportunity for judicial statesmanship in *Marbury v. Madison*. Section 14 then confers upon all the courts created by the act the power

"* * * to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

Section 15 then proceeds to confer the power to require parties to produce books and documents on the trial of actions at law; Section 17, the power to grant new trials, to impose oaths and affirmations and to punish for contempt; Section 18, the power to stay executions; Section 30, the power to admit in evidence depositions *de bene esse* under certain circumstances, and to compel witnesses to appear and depose.

3. The mode of proof. Section 30 requires, except where depositions are permitted,

"* * * that the mode of proof by oral testimony and examination of witnesses in open court shall be the same in all courts of the United States * * *"

including, contrary to English practice, chancery and admiralty cases—a provision not relaxed until the Act of April 29, 1802.

4. The substantive law. Section 34 is still our rules of decision act.

And finally and separate from all the others:

5. Practice and procedure. Section 17 empowers the courts

"* * * to make and establish all necessary rules for the orderly conducting business in the said courts, pro-

vided such rules are not repugnant to the law of the United States."

Immediately following and supplementing the Judiciary Act came the Temporary Process Act of 1789, which provided:

"* * * that until further provision shall be made, and except where by this act, or other statutes of the United States is otherwise provided; the forms of writs and executions, except their style, and modes of process * * * in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same."

Then came the Permanent Process Act of 1792 enacting:

"* * * that the forms of writs, executions and other process, except their style, and the forms and modes of proceedings in suits in those of common law shall be the same as are now used in the said courts respectively in pursuance of the act, entitled 'An act to regulate processes in the courts of the United States,' * * * except so far as may have been provided for by the act to establish the judicial courts of the United States, subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same. * * *"

From the foregoing it is apparent that the terms "forms of process," "writs," "pleadings," "motions" and "practice and procedure," as used in the Act of 1934, have their antecedents in the same or similar terms used in the Judiciary Act of 1789; moreover, that these early legislators carefully distinguished between these terms and "modes of proof" and "rules of decisions."

In the first judiciary act Congress organized the courts and vested them with appropriate jurisdiction and power—on the other hand, it left to the courts "to make and establish all necessary rules for the orderly conducting business in the said courts," and in the subsequent process acts, as to

law actions, after prescribing conformity to existing state practice, left it to the courts to alter and add to such practice, and to make regulations.

The terms used in these early acts are similar to those in the Conformity Act, and as already pointed out, these terms, as used in that act, have never been construed to include matters of jurisdiction or power.

The creation and organization of the courts and their jurisdiction and power are all within the legislative domain. The making of rules for the transaction of business within the jurisdiction and power conferred is for the courts—that is practice and procedure.

This distinction, it is submitted, is inherent in our scheme of constitutional government.

In so far as the report is confined to matters of practice and procedure it represents, in general, a much-needed simplification and reform. Some of the objectionable features of the preliminary draft have been modified. The question, however, remains whether many of the proposed rules do not exceed the scope of the power conferred by the enabling act and either border upon, or enter, the field of legislation. Some of these rules will now be considered.

APPENDIX IV

SECTION 9723, Mississippi Code 1942.

9723. *Home defined.*—The word “home” or “homestead” whenever used in this act, shall mean the dwelling, the essential outbuildings and improvements and the land, actually occupied as the home of a family group, eligible title to which is owned by the head of the family; subject to the limitations and conditions contained in this act. And the meaning of the words is hereby extended to specifically include:

(a) One or more separate, bona fide homes each occupied under eligible ownership rights, by the widow, the widower, or a family group of heirs, each home being property or a portion of property owned by a deceased person whose

estate has not been distributed or divided or vested in some one for life. But in each case the property for which exemption is sought may not be more than the applicant's inherited portion and must be accurately described on the application, and explained.

(b) Not more than two separate, bona fide homes occupied each by a family group, eligible title to which property is owned jointly, by purchase or otherwise, by the heads of the families.

(c) A dwelling and lands owned jointly or severally by a husband and wife, if they are actually and legally living together.

(d) The home owned and maintained by a bona fide minister of the gospel or by a licensed school teacher, actively engaged, whose duties as such require them to be away from the home a considerable time each year, including January first; provided no income is derived therefrom, except direct proceeds of agricultural products produced thereon.

(e) A dwelling, and the eligible land on which it is located, consisting of two entirely separate apartments only, each apartment being a complete independent living unit, provided; (1) if one unit is actually occupied as a home by the or an owner, the exemption shall be proportionate to the assessed value of the whole, but in no event more than one-half of the whole assessed value, or (2) if the property is owned by two persons and if both units are occupied each by one of the owners as a home, and if no revenue is derived from any part of the property except as permitted by paragraphs (f), (g) and (h), hereof, exemption shall be granted on the whole, one-half of the assessed value to each.

(f) The bona fide residence of a family group owned by the head of the family, whereof not more than four rooms are rented to tenants or boarders.

(g) The bona fide residence of a family group owned by the head of the family, used partly as a boarding house or

for the entertainment of paying guests, if the number of boarders or paying guests does not exceed eight.

(h) The bona fide residence of a family group owned by the head of the family, wherein activity of a business nature is carried on, but which is only nominal in volume, requiring no special allotment of space, no disarrangement of any part of the house as the home, or no special equipment.

(i) Land used for agricultural purposes as defined in section 5 (g) (Sec. 9719) of this act, even though ownership of and title to the dwelling and the site on which it is located has been conveyed to a housing authority for the purpose of obtaining the benefits of the Housing Authorities Act (chapter 338, Laws of 1938) (Title 26, ch. 3) and any amendments thereto or related laws; provided the owner was entitled to homestead exemption on the land before and at the time such conveyance was made.

APPENDIX V

Section 9729, Mississippi Code 1942.

9729. Duty of applicant for homestead exemption—how made.—Every person who is entitled to and desires the homestead exemption provided for in this act:

(a) Shall make annual written application therefor to the tax assessor on the prescribed form, on or before the first day of June, each year, beginning with the year 1940, and applications not actually on file on or before June 1 of the current year, may not be dated back, may not be accepted by the assessor, and may not be approved by the board of supervisors or by the commission;

(b) Shall make the application in triplicate;

(c) Shall make separate applications, each in triplicate, to the respective assessors, if all or a part of the property claimed for exemption, lies in a municipal separate school district; and,

(d) Shall make separate applications, each in triplicate, to the respective assessors, if the property claimed for exemption lies in two counties;

(e) Shall deliver to each assessor the application marked "original" and the copy marked "duplicate";

(f) Shall retain the copy marked "triplicate" as evidence of the application and that it was filed;

(g) The application shall show the name of the owner of the property and

(h) The name of the applicant, whether the same as the name of the owner or not; and

(i) Shall contain description of the property, which shall clearly locate and identify it and state the acreage contained, as prescribed in section 13 (Sec. 9727) of this act;

(j) Shall state the kind of title or ownership right held;

(k) Shall state number of book and page whereon deed or other conveyance or evidence of ownership is of public record, or attach to both the original and duplicate application a certified copy of the conveyance by which title is claimed or such other evidence of title as may be required by the commission;

(l) If the property was acquired by the owner after July 1, 1938, as evidenced by the date of the acknowledgment of the conveyance, the application shall state in dollar terms the price for which the property was sold and conveyed to the owner, and the amount of the unpaid principal outstanding on January 1, 1940 or on January 1 of the year in which the application is made;

(m) Shall give such other pertinent information as may be required by the commission;

(n) All of the information given in the application must be true and correct, and must be supplied by the applicant in the event he does not prepare the application with his own hand. The answer to questions and the information

given on the application must not be made or inserted by the assessor or by anyone except as furnished by the applicant himself or herself;

(o) The application shall be made personally by the applicant, or may be made by his or her agent or attorney duly constituted in writing if a copy of such written authority, duly sworn to and acknowledged or attested by two competent witnesses, be attached to each the original and duplicate application for homestead exemption;

(p) The application must bear an affidavit by the applicant to the truth of all statements contained therein, and the affirmation may be administered by the tax assessor, a member of the board of supervisors, or any other officer authorized by law to take acknowledgments.

(1714)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 234

MISSISSIPPI PUBLISHING CORPORATION,

Petitioner,

vs.

DENNIS MURPHREE,

Respondent

ADDITIONAL MEMORANDUM FOR PETITIONER

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ADDITIONAL MEMORANDUM FOR PETITIONER

Since submitting this case our attention has been directed to the report of Charles J. Zinn, Counsel, House of Representatives, Committee on Revision of the Laws, dated October 30, 1945. The report is in the following language:

“House of Representatives,
Committee on Revision of the Laws,
Washington, October 30, 1945.

“Hon. Eugene J. Keogh,
Chairman, Committee on Revision of the Laws,
House of Representatives.

“DEAR MR. KEOGH: I am submitting herewith a preliminary draft of the complete proposed revision and codification of the Federal Judicial Code. This draft contains the text of the laws together with reviser's notes to each section.

"Although the draft is subject to further revision and corrections, it is hoped that even in its present form it will be useful in showing our method of approach and in evoking helpful suggestions.

"Respectfully yours,

CHARLES J. ZINN,
Counsel."

"FOREWORD

"The Committee on Revision of the laws is now engaged in drafting a substantive revision of existing Federal laws relating to the courts and the judiciary. The majority of these laws may now be found classified and codified in title 28 of the United States Code, although many additional provisions relating to the specific subject matter of other titles of the code are to be found in such other titles.

"There has been no complete revision or codification of these laws since the enactment of the Judicial Code in 1911, with the result that these laws of the United States are now in a more chaotic state than were the internal-revenue laws prior to the enactment of the Internal Revenue Code in 1939.

"Many of the sections of the 1911 Judicial Code have been superseded although not specifically repealed. The archaic language of the Revised Statutes of 1874 is still preserved in many instances in that code. Many provisions have been superseded by the Rules of Civil Procedure promulgated by the Supreme Court which became effective in 1939. Our courts and lawyers must, therefore, administer justice with outmoded, unscientific, inadequate, and unsatisfactory tools. Most of our States are equipped with modern codes governing their citizens, and it is only fitting that the Federal laws on this and other subjects be revised and codified to do away with the chaos and uncertainty surrounding our laws.

"SCOPE OF THIS PRELIMINARY DRAFT

"The preliminary draft submitted herewith covers the entire proposed revision which has been divided

into six parts. The language of the sections has been modernized and surplusages have been eliminated. Where desirable for clarity and brevity sections and subsections have been consolidated.

"Each section in the preliminary draft is followed by a comprehensive reviser's note, stating the source of the section and explaining fully the changes made.

"It is important to note that this is only a preliminary draft subject to correction and amendment and is submitted primarily for the purpose of indicating the mode of procedure adopted in this revision and to present something concrete to the public upon which suggestions may be offered. A number of suggestions already received by the committee, not yet incorporated in the draft, will be inserted later, together with certain revisions and corrections of this draft presently being considered by the revisers.

"REVISION STAFF

"The Committee on Revision of the Laws has engaged the services of the West Publishing Co. of St. Paul, Minn., and the Edward Thompson Co. of Brooklyn, N. Y., both well-known law publishing companies who have assisted the committee heretofore in the preparation of the several editions of the United States Code and supplements thereto and the revised Criminal Code which has been embodied in H. R. 2200, Seventy-ninth Congress. These companies have been working very closely with this committee's counsel, Charles J. Zinn, of New York, and John F. X. Finn, of New York. An advisory committee of distinguished personnel has carefully reviewed the work of the revisers. It consists of Hon. Floyd E. Thompson, Chairman, of Chicago, Ill., a former chief justice of the Illinois Supreme Court and president of the Chicago Bar Association; Hon. Justin Miller, of Washington, D. C., former associate justice of the United States Court of Appeals for the District of Columbia; Hon. John B. Sanborn, of St. Paul, Minn., judge of the United States Circuit Court of Appeals for the Eighth Circuit; Hon. Walter

P. Armstrong, of Memphis, Tenn., former president of the American Bar Association; and Hon. John Dickenson, of Philadelphia, Pa. The combined editorial staffs of the two companies have been supplemented by William W. Barron, former Chief of the Appellate Section, Criminal Division of the Department of Justice, who is acting as reviser, and Frank J. Parker, assistant United States attorney for the Eastern District of New York. In addition to the foregoing, Hon. John J. Parker, of Charlotte, N. C., senior circuit judge of the United States Circuit Court of Appeals for the Fourth Circuit is acting as a judicial consultant. Hon. Alexander Holtzoff, United States District Judge for the District of Columbia, secretary of the Supreme Court Advisory Committee on the Rules of Criminal Procedure, and Prof. James W. Moore, of Yale University, Chief Research Assistant to the Supreme Court Advisory Committee on Rules of Civil Procedure, are acting as special consultants.

"Invaluable assistance has been rendered to the revision staff by the Judicial Conference Committee on the Judicial Code, appointed by Chief Justice Stone, consisting of United States Circuit Judge Albert B. Maris, chairman, and United States District Judges Clarence G. Galston, of the Eastern District of New York, and William F. Smith, of the District of New Jersey."

EUGENE J. KEOGH,
Chairman, Committee on
Revision of the Laws.

October 31, 1945."

The suggested statutes dealing with venue are found at page 265 and with explanatory notes are in the following language:

Section 1391. RESIDENCE GENERALLY.

(a) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is

doing business, and such judicial district shall be regarded as the residence of such corporations for the purposes of this section.

(b) A civil action wherein jurisdiction is founded only on diversity of citizenship may be prosecuted only in the judicial district where all plaintiffs or all defendants reside.

(c) Except as otherwise provided, a civil action may be prosecuted only in the judicial district where all defendants reside.

(d) A district court may proceed as to parties before it although one or more dispensable parties defendant do not reside within its district, but its judgment shall be without prejudice to such absent parties.

REVISER'S NOTE

Section Revised

Based on Title 28 U. S. C., 1940 ed., Sections 111, 112 (Mar. 3, 1911, ch. 231, Sections 50, 51, 36 Stat. 1101; Sept. 19, 1922, ch. 345, 42 Stat. 849; Mar. 4, 1925, ch. 526, Section 1, 43 Stat. 1264; Apr. 16, 1936, ch. 230, 49 Stat. 1213).

Section consolidates section 111 of Title 28 U. S. C., 1940 ed., with part of section 112 of such title.

The portion of section 112 of Title 28 U. S. C., 1940 ed., relating to venue generally constitutes this section and the parts relating to arrest of the defendant, venue and process in stockholders' actions constitute sections 1401, 1693 and 1695 of this title.

Word "action" was substituted for "suit" in view of Rule 2 of the Federal Rules of Civil Procedure.

Word "reside" was substituted for "whereof he is an inhabitant" for clarity inasmuch as "inhabitant" and "resident" are synonymous. See *Ex Parte Shaw*, 1892,

12 S. Ct. 935, 145 U. S. 444, 36 L. Ed. 768; *Standard Stoker Co., Inc., v. Lower*, D. C. 1931, 46 F. 2d 678; *Edgewater Realty Co. v. Tennessee Coal, Iron & Railroad Co.*, D. C. 1943, 49 F. Supp. 807.

References to "all plaintiffs" and "all defendants" were substituted for references to "the plaintiff" and "the Defendant," in view of many decisions holding that the singular terms were used in a collective sense. See *Smith v. Lyon*, 1890, 10 S. Ct. 303, 133 U. S. 315, 33 L. Ed. 635; *Hooe v. Jamieson*, 1897, 17 S. Ct. 596, 166 U. S. 395, 41 L. Ed. 1049; and *Fetzer v. Livermore*, D. C. 1926, 15 F. 2d 462.

Subsection (d) is a concise revision of section 111 of Title 28 U. S. C., 1940 ed., without change of substance.

In such subsection, references to defendants "found" within a district or voluntarily appearing were omitted. The use of the word "found" made section 111 of Title 28 U. S. C., 1940 ed., ambiguous. The argument that an action could be brought in the district where one defendant resided and a non-resident defendant was "found," was rejected in *Camp v. Gress*, 1919, 39 S. Ct. 478, 250 U. S. 308, 63 L. Ed. 997. However, this ambiguity will be obviated in the future by the omission of such reference.

Changes were made in phraseology.

Section 1392. DEFENDANTS OR PROPERTY IN DIFFERENT-DISTRICTS IN SAME STATE.

(a) Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be prosecuted in any of such districts.

(b) Any civil action, of a local nature, involving land or other subject matter of a fixed character located in different districts in the same State, may be prosecuted in any of such districts.

REVISER'S NOTE

Section Revised

Based on Title 28 U. S. C., 1940 ed., Sections 113, 116 (Mar. 3, 1911, ch. 231, Sections 52, 55, 36 Stat. 1101, 1102):

Section consolidates section 113 of Title 28 U. S. C., 1940, ed., with section 116 of such title.

Last sentence of section 113 of Title 28 U. S. C., 1940 ed., relating to execution on judgments or decrees was omitted as covered by section 2001 et seq. of this title.

Words "civil action" were substituted for "suit" in view of Rule 2 of the Federal Rules of Civil Procedure.

Words "against a single defendant, inhabitant of such State, must be brought in the district where he resides" were omitted as covered by section 1391 of this title.

Words "and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause *mesne* or final process to be issued and executed, as fully as if the said subject matter were wholly within the district for which such court is constituted" were omitted as surplusage and fully covered by Rule 4 of the Federal Rules of Civil Procedure. Said Rule also covers the following omitted language: "A duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides."

Changes were made in phraseology.

Section 1393. DIVISIONS; SINGLE DEFENDANT; DEFENDANTS IN DIFFERENT DIVISIONS.

(a) Any civil action, not of a local nature, against a single defendant in a district containing more than one division may be prosecuted only in the division where he resides.

(b) Any such action, against defendants residing in different divisions of the same district, may be prosecuted in any of such divisions.

REVISER'S NOTE

Section Revised

Based on Title 28 U. S. C., 1940 ed., Section 114 (Mar. 3, 1911, ch. 231, Section 53, 36 Stat. 1101).

Second sentence of section 114 of Title 28 U. S. C., 1940 ed., relating to *mesne* and final process was omitted as covered by section 1692 of this title and Rule 4 of the Federal Rules of Civil Procedure.

The third and fourth sentences of section 114 of Title 28 U. S. C., 1940 ed., relating to transfer of criminal proceedings from divisions of district courts were omitted as fully covered by Rule 19 of the Federal Rules of Criminal Procedure.

The last sentence of section 114 of Title 28 U. S. C., 1940 ed., relating to removal of cases from State to Federal district courts, is incorporated in section 1441 of this title.

Changes were made in phraseology.

We submit to the court that this information is of great interpretive value. The preparation of the statutes was had by a distinguished corps of editors and lawyers, some of whom were connected with the Advisory Committee for the preparation of the Rules of Civil Procedure for use in said courts. It is significant that the statutes as redrafted, dealing with the venue of corporations, consists largely of clarification of previous statutes and omitting ancient and ambiguous descriptive terms. From this memorandum it appears:

First: That the rule which we have contended for in this case, that even where the plaintiff was a resident of

the district it was necessary that the foreign corporation be founded in the district, is made perfectly clear.

Second: The long line of cases decided by this court wherein it is held that a foreign corporation may only be sued by a resident in the district where it is transacting business is again finding its expression in codification.

Third: It is perfectly evident from this information, together with the report of the Chairman of the Judiciary Committee of the House of Representatives, reporting the rules of Civil Procedure with the comments thereupon by the Advisory Committee, that neither the Committee nor the House of Representatives were of the opinion that the suability, that is to say that the place of suit of a foreign corporation was not in any manner being changed or modified.

Fourth: Recently, that the announcements by the court of the rule set forth in the codification hereinbefore referred to would be entirely consistent in the light of Congressional history, to which the court's attention was directed in our reply brief.

This matter has just come to our attention and we trust that it is not improper for us to submit the same.

Respectfully submitted,

WILLIAM H. WATKINS,

P. H. EAGER, JR.,

RALPH B. AVERY,

MRS. ELIZABETH HULEN,

Jackson, Mississippi,

Attorneys for Petitioner.

E. C. BREWER,

Clarksdale, Mississippi,

Of Counsel.

I, William H. Watkins, of Counsel for the Petitioner in the above entitled case, certify that I have this day delivered to Rufus Creekmore and H. H. Creekmore, Counsel for Respondent, each a true and correct copy of the foregoing additional memorandum on behalf of petitioner and have mailed a copy thereof by United States mail to W. E. Gore, Jackson, Mississippi, likewise of counsel for the respondent.

This the 17th day of December, 1945

WM. H. WATKINS,
Of Counsel.

(1902)

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**CHARLES ELMORE CROPLEY
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**IN THE SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, 1945

NO. 234

MISSISSIPPI PUBLISHING CORPORATION,

Petitioner

VS.

DENNIS MURPHREE,

Respondent

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TEXT BOOKS CITED

Hughes Federal Practice and Procedure Vol.	
17, Sec. 18, 992	13

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

The respondent respectfully submits that this Honorable Court should not entertain the petition for the issuance of a writ of certiorari in this cause for the following reasons:

I.

The Circuit Court of Appeals has correctly decided all questions presented by this case in accord with applicable decisions of this court.

II.

Petitioner's point No. I is not well taken in that the Circuit Court of Appeals in this case has not decided important questions of federal law not heretofore settled by this court; but on the contrary its decision is in accord with the applicable decisions of this court.

III.

Petitioner's point No. II is not well taken in that the decision of the Circuit Court of Appeals in this case is not contrary to but rather is in accord with applicable decisions of this court construing sections 112 and 113 U. S. C. A. Title 28. (Judicial Code Secs. 51 and 52).

IV.

Petitioner's point No. III is not well taken in that, thereby petitioner merely seeks to have this court review the evidence and overturn a finding of fact made by the District Court.

ADDENDA TO PETITIONER'S STATEMENT OF MATTERS INVOLVED.

1. The respondent, a citizen of the Northern District of Mississippi, filed his suit in the District Court thereof against the petitioner, a foreign corporation. (R. pp. 43-44).

2. Petitioner was doing business in the Southern District of Mississippi where its principal office in the state was located. It has been duly admitted to carry on business in the State of Mississippi, and as a condition precedent thereto, in accordance with the laws of the state, had appointed a citizen of the Southern District of Mississippi, as its agent for service of process. (R. pp. 28-29).

3. The cause of action sued on arose in the Southern District of Mississippi. (R. p. 44).

4. Jurisdiction of the Federal Court was founded only on the fact that the suit was between citizens of different states. (R. p. 3).

5. Jurisdiction of the person of the petitioner was had through process issued by the Clerk of the Northern District, and by the Marshal of the Southern District personally served upon petitioner's agent for the service of process, all pursuant to rule 4, section (f) Federal Rules of Civil Procedure. (R. pp. 7 and 44).

6. The District Court held that there was not proper venue in the Northern District, giving as its reason therefor the following:

"As I read the opinion of the Supreme Court of the United States in **Neirbo Co. vs. Bethlehem Corporation** — 308 U. S. 167 — what the court holds is in substance that for purposes of jurisdiction the court will still recognize the legal fiction of citizenship of a corporation in the state of its incorporation; but that for purposes of venue it will adopt the practical and realistic view that such corporations are domiciled in any District where they do business and have in accordance with the mandates of state law appointed agents for the service of process.

"If this be the correct view of the holding in the Neirbo case it follows that under Section No. 113 of the Judicial Code the defendant in this case, is in that limited sense, an inhabitant of the State of Mississippi, and entitled to be sued in the District of the state where it resides.

"It follows that there is not proper venue in the Northern District of Mississippi and the motion to dismiss for want of venue is sustained." (R. p. 44).

7. The Circuit Court of Appeals in reversing

the case held that venue was properly laid because jurisdiction was founded only on the fact that the action was between citizens of different states and the suit was filed in the district of the residence of the plaintiff, and further because by the appointment of an agent for the service of process, in accordance with the laws of the State of Mississippi, the petitioner affirmatively consented to be sued in any of the courts of the State of Mississippi, including the Federal Court. The Circuit Court of Appeals further held that jurisdiction of the person of the defendant was acquired pursuant to the process issued and served under Rule (f) of the Rules of Civil Procedure, and that by such service of process neither the venue nor the jurisdiction of the court was extended. 149 Fed. (2d) 139.

ARGUMENT.

I.

The Circuit Court of Appeals has correctly decided all questions presented by this case in accord with applicable decisions of this court.

1. Prior to 1887, the general venue statute provided that no civil suit could be brought against any person "in any other district than that whereof he is an inhabitant, or in which he shall be found." The Act of 1887 omitted the words "in which he shall be found," and added the presently existing provis-

ion (28 U. S. C. A. Sec. 112) that where jurisdiction is founded solely on diversity of citizenship "suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Since the 1887 amendment was adopted we have found no case wherein the court has held that venue was improper in diversity of citizenship cases, where suit was brought against a corporate defendant in the district of which the plaintiff was a citizen. The *Neirbo* case does not hold to the contrary, but in effect recognizes that no valid question could have been raised had the suit been brought in the district of the residence of the plaintiff; the first paragraph of the opinion in that case containing this sentence: "The suit was based on diversity of citizenship and was not brought 'in the District of the residence of either the plaintiff or the defendant.'" The lower court, in that case expressly held, and as shown above, the holding to that extent was not disturbed by the Supreme Court that "... had plaintiffs been residents of the Southern District of New York, so that venue was properly laid, service of process upon the defendant would have been had by service upon its agent." (*Neirbo v. Bethlehem Shipbuilding Co.*, 103 Fed. (2d) 765-770).

Some of the many cases holding that venue is properly laid in diversity cases where the suit is filed in the district of the plaintiff's residence, and none of which are disturbed by the *Neirbo* case, are: *McCormick v. Walthers*, 134 U. S. 41, 33 L. Ed. 833;

Munter v. Weil Corset Co., 261 U. S. 276, 43 S. Ct. 347, 67 L. Ed. 652; **Seaboard Rice Milling Co. v. C. R. I. & P. R. R. Co.**, 270 U. S. 363, 70 L. Ed. 633; **Mass. Bonding & Insurance Co. v. Concrete Steel Bridge Co.**, 37 Fed. (2d) 696 (Fourth Circuit); **Williams v. James**, 34 Fed. Supp. 61 (D. C. La. 1940); **Coastal Club v. Shell Oil Co.**, 45 Fed. Supp. 859 (D. C. La. 1942); **Andrews v. Joseph Cohen & Sons**, 45 Fed. Supp. 732, (D. C. Texas 1941); **Richard v. Franklin County Distilling Co.**, 38 Fed. Supp. 513 (D. C. Ky. 1911).

2. Since Chief Justice Marshall rendered the opinion in **Gracie v. Palmer**, 8 Wheat. 699, L. Ed. 719, it has been consistently held by the Federal Courts that the provisions of the general venue statute fixing the place where suits shall be brought, does no more than accord to the defendant a personal privilege respecting the venue, or place of suit, which he may assert or waive at his election. (See **Neirbo** case, *supra*, and discussion of the cases in Mr. Justice Frankfurter's opinion.)—

After the amendment in 1887, as the same was construed by the Supreme Court in **Shaw v. Quincy Mining Co.** 145 U. S. 444, 36 L. Ed. 768, and in **Southern P. Co. v. Denton**, 146 U. S. 202, 36 L. Ed. 942, it was generally held that a corporation, by its act in appointing an agent for service of process, could not be held to have waived its right to be sued only in the district of which it was an inhabitant, or in the district of which the plaintiff was a resi-

dent; and, therefore, over its objection, it could not be subjected to suit in a Federal Court in any other district in which it did business or had appointed an agent for the service of process. This was the rule in effect in the Fifth Circuit as announced in the case of **McLean v. Mississippi**, 96 Fed. (2d) 741, 119 A. L. R. 670.

So, prior to the decision in the **Neirbo** case, a foreign corporation such as the petitioner here, doing business in the Southern District of Mississippi, and having an agent for the service of process there, could not, over its objection, be sued in that district, unless the plaintiff likewise lived in that district; but it could be sued in the Northern District if the plaintiff lived there and process could be had, or it could be sued in the Federal Court of the District in the state where its home office was located.

The **Neirbo** case does not attempt to restrict, but rather its effect, through a liberalization and broadening of the legal concept of waiver, is to enlarge the provisions of the general venue statute, so that now a foreign corporation doing business in a state which has appointed an agent for service of process there, can be sued in the Federal Courts in that state, and this even though the plaintiff not be a resident of that state. The rationale of that opinion simply is that by the appointment of an agent for the service of process in a state in which a foreign corporation is doing business, in accordance with the laws of that state, the corporation thereby waives

the provisions of the venue statute, which it otherwise would be entitled to assert, and affirmatively consents to be sued in that state,—not only in the State courts, but in the Federal Courts sitting therein.

If the Neirbo case be construed to accord with the ruling of the District Court, and in accord with petitioner's contention, then it would mean that a foreign corporation, by waiving a privilege and consenting to be sued in one district, thereby acquired a right, theretofore not had by it, namely, not to be sued elsewhere, even in the district of which plaintiff was a resident. No such meaning can be derived from that opinion.

3. The ruling of the District Court was anchored on the proposition that the Neirbo case required adoption of the practical and realistic view, that for purposes of venue, foreign corporations "are domiciled in any district where they do business and have, in accordance with the mandate of state law, appointed agents for the service of process," and, therefore, the defendant within the meaning of Sec. 52 Judicial Code (28 U. S. C. A. Sec. 113) was "an inhabitant of the State of Mississippi and entitled to be sued in the District of the State where it resides." (R. p. 44). But it is well recognized and long established law that the word "inhabitant" and "resident" as the same are used in Secs. 112 and 113 are synonymous with the word "citizen" and all include the idea of domicile. A corporation is not

and cannot be a citizen, inhabitant, or resident of a state in which it has not been incorporated. *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 36 L. Ed. 768; *Galveston H. & S. A. Railway Co. v. Gonzales*, 151 U. S. 496, 38 L. Ed. 248; *In re: Keasbey M. Co.*, 160 U. S. 221, 40 L. Ed. 402; *Seaboard Rice Milling Co., v. Chicago R. I. & P. R. R. Co.*, 270 U. S. 363, L. Ed. 633.

As we have previously undertaken to show, the *Neirbo* case does no more than hold that in diversity of citizenship cases the privilege accorded the defendant, under the general venue statute (28 U. S. C. A. Sec. 112) of being sued only in the district of the residence of either the plaintiff or the defendant may be waived, and is waived where it does business in some other state, and appoints there an agent for the service of process. The opinion in that case does not disturb the well established principle set forth in the cases cited above that within the meaning of the venue statutes residence, habitation and domicile are synonymous in their meaning. Instead of disturbing those principles, the *Neirbo* case, impliedly at least, recognizes their validity; and even those members of the court who constituted the minority did not understand the main opinion to hold otherwise. Thus, in his dissenting opinion, Mr. Justice Roberts at page 176 said:

"Whatever may be said in support of the original adoption of a different ruling, it has been the law for a century that as respects the

jurisdiction of the Federal Courts over a corporation in diversity of citizenship cases, the corporation is a citizen and resident of the state of incorporation and no other state. I do not understand the court's opinion to repudiate the rule."

Since, therefore, the petitioner is not a resident of Mississippi, but of Delaware, the venue is fixed by Section 51 of the Judicial Code (28 U. S. C. A. Sec. 112), and Section 52 Judicial Code (28 U. S. C. A. Sec. 113) can have no application.

4. The Mississippi Statute (Sec. 5319 Code 1942) provides that every foreign corporation doing business in the state shall appoint a resident agent upon whom service of process may be had in any suit against the corporation. (See Appendix A for text of the statute). It was in obedience to the mandate of this statute that defendant appointed its resident agent for the service of process.

The Supreme Court of Mississippi has construed this statute as making the agent thus appointed, regardless of his actual residence or domicile, an agent for the service of process in any suit brought against the corporation in any county of the state, so that process may issue from the county in which the suit is brought, be served upon the resident agent in the county of his residence, and thereby the court obtains jurisdiction over the person of the defendant corporation. In other words, so far as the effective-

ness of service of process is concerned the residence of the agent in contemplation of law, is in every county in the state. *Sanford v. Dixie Const. Co.*, 157 Miss. 627, 128 So. 837.

In the Sanford case suit was filed in Forrest County and process served on the resident agent of the defendant foreign corporation in Harrison County where the agent resided, and there it was held that the Circuit Court of Forrest County had jurisdiction of the suit and of the person of the defendant. In construing the statute the court remarked that where, pursuant to its provisions a foreign corporation has duly designated a resident agent, "process may be served in the same way and as easily and as certainly and with as full and complete effect as upon a like agent of a domestic corporation;" (Opinion p. 632) and the court then held that by this statute "it was the intention and it has the effect when a foreign private corporation has complied with it, to place the foreign private corporation in regard to venue in transitory actions in exactly the same attitude as a domestic corporation, and that its effect is to domesticate the said foreign private corporation for the purposes of suit and process—although for that purpose only." (Op. pp. 634-635).

And, accordingly, the Supreme Court of Mississippi in a later case held, that venue being properly laid in accordance with the State Statute, service of process on the resident agent of the foreign

corporation in the county of his residence is valid, and the court acquires jurisdiction both of the subject matter and of the person of the defendant, even though the cause of action arose outside of the State of Mississippi. **Tri-State Transit Co. v. Mundy**, 194 Miss. 714; 12 So. (2d) 920.

The contract thus made between petitioner and the State of Mississippi, whereby it appointed a process agent, and in consideration of the protection given it by the state, consented to be sued therein, was a real contract, and the consent thus given extended to any court sitting in the state which applies the laws of the state, which included the District Court of the United States for the Northern District of Mississippi. **Neirbo Co. v. Bethlehem Shipbuilding Corp.**, 308 U. S. 165, 84 L. Ed. 167; **Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.**, 309 U. S. 4, 84 L. Ed. 537; **Mass. Bonding & Ins. Co. v. Concrete Steel Bridge Co.**, 37 Fed. (2d) 695 (Fourth Circuit); **Coastal Club v. Shell Oil Co.**, 45 Fed. Supp. 859; (D. C. La. 1942); **Barnes v. Wilson**, 40 Fed. Supp. 689 (D. C. Wis. 1941); **Williams v. James, etc.**, 34 Fed. Supp. 61 (D. C. La. 1940).

5. Process was issued by the Clerk of the Northern District, directed to the marshal of the Southern District, and by him served upon H. V. Watkins, Jr., a resident of the Southern District, who pursuant to provisions of the Mississippi law had been appointed agent of the petitioner for receiving service of process. The issuance and service

of process was regular in every respect, and the court thereby acquired jurisdiction of the person of the petitioner. Federal Rules of Civil Procedure, Rule 4 (f); Mississippi Code 1942 Sec. 5319; **Schwarz v. Artcraft Silk Hosiery Mill**, 110 Fed. (2d) 465 (Second Circuit); **O'Leary v. Lofton**, 3 F. R. D. 36 (D. C. N. Y. 1942); **Williams v. James**, 34 Fed. Supp. 61 (D. C. La. 1940); **Coastal Club v. Shell Oil Co.**, 45 Fed. Supp. 859 (D. C. La. 1942); **Hughes Federal Practice & Procedure Vol. 17, Sec. 18,992.**

By this method of serving process upon the petitioner neither the jurisdiction nor the venue of the court was extended or enlarged. When petitioner qualified to do business in the State of Mississippi, and pursuant to the laws of the State, appointed a resident agent for the service of process, it thereby consented to be sued in any of the courts sitting in the state which applied the laws of the state, and this included the United States District Court for the Northern District of Mississippi. By its act in so appointing a resident agent for the service of process pursuant to the laws of the State, the foreign corporation thereby, for the purpose of suit and process, became domesticated, and subject to suit in the same manner as any domestic corporation, and process could be served upon it in the same manner as upon any such domestic corporation. The residence of the agent in contemplation of law was in every county in the state, so that venue being present, suit could be filed in any county of the state and process issue from the proper court sitting

therein, and be served upon the agent of the corporation at his residence wherever in the state it might be.

So there is presented here no matter of extending or enlarging the jurisdiction or venue of the court, but purely a procedural matter, whereby pursuant to Rule 4 (f) process was served upon petitioner's agent, and its person brought before the court.

II.

In their brief counsel have grouped and argued together under point I thereof, their stated reasons numbered II, III, VI and VII as set forth in the petition. We will follow the order thus established.

A. It is said that the decision of the Circuit Court of Appeals in this case grows out of a misunderstanding of **Neirbo Co. v. Bethlehem Shipbuilding Corp.**, 308 U. S. 356, 84 L. Ed 167, 128 A. L. R. 1847 and of **Oklahoma Packing Co. v. Oklahoma Gas and Electric Co.**, 309 U. S. 4, 84 L. Ed. 537. It is said that in the **Neirbo** case, "this court held that by the appointment of an agent for the service of process the defendant has consented to be sued in the Federal Courts of New York in the District where it was engaged in business and maintained its principal office and place of business." (Brief p. 14). It so happened that the suit was brought in the District Court where the defendant maintained its principal

office, but that fact in no wise influenced the court in its decision. Its holding was that by appointing an agent for the service of process in accordance with the laws of New York, Bethlehem waived the privilege conferred by Section 51 of the Judicial Code, and consented to be sued in "any Court sitting in the State which applies the laws of the state." (Opinion p. 171).

It is said by counsel for petitioner that in the *Neirbo* case "the court held that for practical purposes of venue the Bethlehem was a resident and inhabitant of the Southern District of New York," (Brief p. 15); and in discussing *Ex Parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853, it is said that "the court held that such insurance company for purposes of venue became an inhabitant of the District in which it carried on business," (Brief p. 15); and in discussing *B. & O. Railroad Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354, it is said that "this court held that such foreign corporation was an inhabitant of the particular district in which it was engaged in business." (Brief p. 15). In each of these statements counsel are mistaken as to the holdings of the court. A reading of those cases will show that none of them held that for the purposes of venue the foreign corporation became an inhabitant of the district in which it carried on business; but each of them did hold that by reason of the facts set forth therein, the foreign corporation consented to be sued in the courts sitting in the particular state.

We agree that the construction placed by the Supreme Court of Mississippi upon Section 5319 Mississippi Code of 1942, providing for the appointment by foreign corporations doing business in the State of a resident agent for service of process, is binding upon the Federal Courts. We have already discussed this section of the Mississippi Code, and have shown what construction has been placed upon it by the Supreme Court of Mississippi. (Supra pp. 10-12). In brief, that construction is that for purposes of process and suit the foreign corporation becomes domesticated, so that if venue be properly laid, service of process on the resident agent is valid and effective to bring into Court the person of the defendant, regardless of where the suit is brought, or where the resident agent lives. *Sanford v. Dixie Const. Co.*, 157 Miss, 627, 128 So. 887; *Tri-State Transit Co. v. Mundy*, 194 Miss. 12 So. (2d) 920.

Foreman v. Mississippi Publishers Corp. 195 Miss. 90, 14 So. (2d) 344 cited by petitioner does not hold to the contrary. No question was raised there as to the validity of the process, and all parties apparently conceded it to be valid. The question in that case was one of venue under the state statute, and the court held that venue was absent in the particular county where suit was brought. But it is elementary that the state statute governs the venue of actions in the State courts and the Federal Statute governs the venue of actions in the Federal Courts.

B. & C. It is urged that by its decision the Circuit Court of Appeals has so construed Rule 4 (f) Federal Rules of Civil Procedure as to enlarge the jurisdiction and venue of the District Court for the Northern District of Mississippi. It may be conceded that no rule of court can operate to enlarge or abridge the jurisdiction or the venue of Federal Courts, but it is obvious that such has not been done by the application of Rule 4(f) to the facts in this case. The District Court held that such was not done by the service of process on petitioner (R. p. 44); and the Circuit Court of Appeals held the same (149 F. (2d) 138). Here the general jurisdiction of the District Court is present because of diversity of citizenship as provided by 28 U. S. C. A. Section 41 (b), and venue is grounded upon the bringing of the suit in the district of which the plaintiff is a citizen, as provided by 28 U. S. C. A. Section 112(a). Therefore, any argument that the jurisdiction or venue of the court has been extended stems from the fact that the foreign corporation had no office or agent, and did no business in the Northern District of Mississippi, so that process had to be served upon the agent of the company who resided in the Southern District. There is presented, therefore, a question of jurisdiction of the person rather than jurisdiction of the subject matter, and since the only question as to jurisdiction of the person is whether the process may be served outside of the district where suit was brought, that question is purely one of procedure. In the preceding pages of this brief,

we have discussed that point (Brief pp. 12-14), and we will not further elaborate on it.

To support their contention however, counsel cite numerous cases, but a great majority of those cited do not even remotely touch the point involved, and these cases we will not discuss.

Contracting Division A. C. Horne Corp. v. New York Life Insurance Co., 113 Fed. (2d) 864 (Petitioner's Brief p. 17) presented a question of venue in a patent case. There is a special statute covering the venue in such cases, and the court merely held that since the suit was not brought in accordance with that statute it should be dismissed.

Sewchulis v. Lehigh Valley Coal Co. 233 Fed. 422 and **Keller v. American Sales Book Co.**, 16 Fed. Supp. 189 were both decided prior to the adoption of the Federal Rules of Civil Procedure. They each held that process could not run beyond the boundaries of the district in which the suit was filed, and this undoubtedly was the law prior to the adoption of the Rules. The purpose of Rule 4(f) was to correct the evils that arose by virtue of that situation.

Melekov v. Collins, 30 Fed. Supp. 159 and **Carby v. Greco**, 31 Fed. Supp. 251, each held that a summons served on a defendant in a district of the state other than that in which the suit was filed, was notwithstanding Rule 4(f), inoperative, and gave the court no jurisdiction over the person of the defendant. These cases are contrary to the weight of authority

(See brief page 13 supra); but regardless of this it is also apparent that the factual situation in each of those two cases was quite different from that in the present case. In the Me'ekov case, the suit was filed in the Southern District of California against Melekov, a citizen of Oklahoma, who was found and served with process in the Northern District of California. In the Carby case, suit was filed in the Western District of Kentucky against Greco, a citizen of Alabama, and service of process was had upon the Secretary of State of Kentucky in the Eastern District of the State, Kentucky having a statute to the effect that any non-resident who operates a motor vehicle within the state, shall thereby constitute the Secretary of State as his agent for the service of process in any civil suit arising out of the operation of the motor vehicle. Thus, in each of those cases the defendant was an individual, while in the case at bar petitioner is a corporation duly qualified to do business in Mississippi, which for purposes of suit and process has been domesticated therein, and has consented to be sued therein.

In *Sibbich v. Wilson & Co.*, 312 U. S. 1, 85 L. Ed. 479 the court had under consideration the validity of Rules 35 and 37 Rules of Civil Procedure, which provided for the physical and mental examination of persons. In upholding these rules the court said:

“Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or

other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States; but it has never essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where the cause of action arose." ... (Op. p. 10).

"In the instant case we have a rule which, if within the power delegated to this court, has the force of a federal statute." ... (Op. p. 13).

"The test must be whether a rule really regulates procedure, — the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. That the rules in question are such is admitted." (Op. p. 14).

"The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose. Evidently the Congress felt the rule was within the ambit of the statute as no effort was made to eliminate it from the proposed body of rules, although this specific rule was attacked and de-

fended before the committee of the two Houses. The Preliminary Draft of the rules called attention to the contrary practice indicated by the Bostford Case, as did the Report of the Advisory Committee and the Notes prepared by the Committee to accompany the final version of the rules. That no adverse action was taken by Congress indicates, at least, that no transgression of legislative policy was found. We conclude that the rules under attack are within the authority granted." (Op. pp. 14-15).

What this court said in the Sibbach case regarding Rules 35 and 37 is equally as applicable to Rule 4(f). The Advisory Committee considered the rule to be procedural, and not to extend nor enlarge the jurisdiction or venue of the District Courts; but nevertheless the point was expressly called to the attention of this court, and the rule was thereafter promulgated.

In fact, it may be noted that petitioner does not question the power of the Supreme Court to promulgate Rule 4(f) nor its validity as written. Thus, in the brief, pages 22-23, it is recognized that if jurisdiction is present, and venue is properly laid in one district, Rule 4(f) becomes effective to send process to some other district for service upon the resident agent; counsel saying that "it is not a matter of substance but a matter of procedure as to where process might be served." So the argument of petitioner always returns to the proposition that

venue was improperly laid in the Northern District.

III.

Under point II of their brief counsel have grouped and argued together their stated reasons I and VIII as set forth in the petition. In its last analysis the argument is that for purposes of jurisdiction and venue petitioner was an inhabitant of the Southern District of Mississippi, and therefore under Section 52 of the Judicial Code could be subjected to suit only in that district.

We agree with the statement in the brief (p. 24) that within the meaning of the statutes fixing federal jurisdiction and venue the words "inhabitant" and "resident" are synonymous. But counsel overlook the fact that the authorities are also unanimous in holding that petitioner is not and cannot be an inhabitant or resident of any state except that in which it was incorporated, i.e., an inhabitant of the State of Delaware; and as we have previously indicated herein this principle was not disturbed by the *Neirbo* case (supra. pp. 9-10). This would seem to dispose of petitioner's point II, but we will nevertheless notice the cases cited. Most of them (brief pp. 25-26) announce the principle that a foreign corporation is not subject to suit in a state in which it does no business and has no agent for the service of process. But none of those authorities are applicable for the obvious reason that in this case the petitioner is doing business in Mississippi, and has duly quali-

fied under the state statute, which as construed by the Supreme Court of Mississippi, has the effect of domesticating petitioner for purposes of suit and process; and by so qualifying under the laws of the state petitioner, under the principle announced in the *Neirbo* case, waived the venue provisions of the federal statute, which it otherwise would have been entitled to assert, and affirmatively consented to be sued in any of the courts sitting in the state, which applied the laws of the state.

The cases of *Robertson v. Railway Labor Board*, 286 U. S. 619, 69 L. Ed. 1119; *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237; *Employers Reinsurance Corp. v. Bryant*, 299 U. S. 374, 81 L. Ed. 289; *McCall Co. v. Bladsworth*, 290 Fed. 365, and *Sewchulis v. Lehigh Valley Coal Co.*, 233 Fed. 422 all dealt with the matter of the validity of process served outside of the district in which the suit was brought. In the *Robertson* and *McCall Co.* cases process was served outside of the state; in the *Harkness* case process was served outside of the boundaries of the territory, and in the *Bryant* and *Sewchulis* cases process was served within the state but beyond the boundaries of the district where suit was filed. All of these cases were decided prior to the adoption of the Rules of Civil Procedure, and since process here was served within the boundaries of the state, pursuant to Rule 4(f) Rules of Civil Procedure, none of those cases can support the asserted proposition that process on petitioner in this case was not valid under that rule.

Stonite Prod. Co. v. Melvin Lloyd Co., 315 U. S. 561, 86 L. Ed. 1027; **Sperry Prod. Inc., v. Association of American Railroads**, 132 Fed. (2d) 408, and **Contracting Division A. C. Horne Corp. v. New York Life Ins. Co.**, 113 Fed. (2d) 864 all presented questions of venue in patent cases. There is a special statute covering the venue of patent cases and the holding in those cases merely was that the suits necessarily had to be brought in accordance with that statute. They have no application here.

The case of **London v. N. & W. Railroad Co.**, 111 Fed. (2d) 127 is not in point because there the suit was brought in the Eastern District of Virginia against a Virginia corporation which had its principal office in the Western District of Virginia. Since the corporation was an inhabitant of the Western District it could not, over its objection, be sued in any other district of the State. The case is quite different from that at bar, because here the suit was brought by the plaintiff in the district of his residence against the defendant, an inhabitant of Delaware.

IV.

Under point number IV (reasons IV and V as stated in the petition) petitioner seeks to have this court overturn the finding of the District Court to the effect that respondent was a citizen of the Northern District of Mississippi.

This court will not grant writs of certiorari to

review the evidence or to discuss specific facts. **General Talking Pictures Corp. v. Western Electric Co.**, 304 U. S. 175, 82 L. Ed. 1273, 58 S. Ct. 848; **U. S. v. Johnston**, 268 U. S. 220, 69 L. Ed. 925, 45 S. Ct. 497; **Southern Power Co. v. North Carolina Public Service Co.**, 263 U. S. 508, 68 L. Ed. 413, 44 S. Ct. 164.

Petitioner did not except to the District Court's finding that respondent was a resident of the Northern District of Mississippi, and, therefore, on petition for certiorari the finding thus made controls. **Hollenbeck v. Leinert**, 295 U. S. 116, 79 L. Ed. 1339, 55 S. Ct. 687.

Moreover, the holding of the District Court, as affirmed by the Circuit Court of Appeals, is in accord with the applicable decisions of this court and with the applicable statute and decisions of the Supreme Court of Mississippi. **Morris v. Gilmer**, 129 U. S. 315, 32 L. Ed. 690, 9 S. Ct. 289; **Dist. of Columbia v. Murphy**, 314 U. S. 441, 86 L. Ed. 329; **McHenry v. State**, 119 Miss. 289, 80 So. 765; **Clay v. Clay**, 134 Miss. 658, 90 So. 181; **Bilbo v. Bilbo**, 180 Miss. 536, 177 So. 722; **Smith v. Dear** (Miss.) 16 So. (2d) 33, Miss. Code 1942 Sec. 4055 (see Appendix B for full text).

CONCLUSION

For the reasons herein stated it is, therefore, respectfully submitted that the petition for writ of certiorari should be denied.

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Jackson, Mississippi

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APPENDIX "A"

Miss Code 1942—SEC. 5319. RESIDENT AGENT:
HOW DESIGNATED.

"Every foreign corporation doing business in the State of Mississippi, whether it has been domesticated or simply authorized to do business within the state of Mississippi, shall file a written power of attorney designating the secretary of state or in lieu thereof an agent as above provided in this section, upon whom service of process may be had in the event of any suit against said corporation; and any foreign corporation doing business in the state of Mississippi shall file such written power of attorney before it shall be domesticated or authorized to do business in this state, and the secretary of state shall be allowed such fees therefor as is (sic) herein provided for designating resident agents. Any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of this state."

APPENDIX "B"

Miss. Code 1942—"SEC. 4055. STATE OFFICERS

—LEGAL RESIDENCE OF, FIXED.—All public officers of this state, who are required to, or who for official reasons, remove from the county of their actual household and residence to another county of this state for the purpose of performing the duties of their office shall be deemed in all respect to be householders and residents of the county from which they so remove unless such officer elects to become an actual householder and resident of the county to which he removed for official causes."

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**IN THE
SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, 1945

Number 234

MISSISSIPPI PUBLISHING CORPORATION, Petitioner

vs.

DENNIS MURPHREE, Respondent

BRIEF FOR RESPONDENT

**W. E. GORE
H. H. CREEKMORE
RUFUS CREEKMORE**

Attorneys for Respondent.

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IN THE
**SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, 1945

Number 234

MISSISSIPPI PUBLISHING CORPORATION, Petitioner

vs.

DENNIS MURPHREE, Respondent

BRIEF FOR RESPONDENT

THE QUESTIONS INVOLVED

The questions presented by this record are:

- (a) Was venue properly laid in the Northern District of Mississippi, the residence of the respondent?

This question arises through the ruling of the District Court that, under the *Neirbo* case (308 U. S. 165, 84 L. Ed. 167), the petitioner, a Delaware corporation, doing business only in the Southern District of Mississippi, where its principal office was located and its agent for service of process resided, was within the meaning of the Federal Venue Statutes, an inhabitant of the Southern

District of Mississippi, and, therefore, under Sec. 52 of the Judicial Code (28 U. S. C. A. Sec. 113), was subject to suit in Mississippi only in that district.

(b) If venue was properly laid in the Northern District, was service of process on petitioner's agent in the Southern District, pursuant to Rule 4(f) Rules of Civil Procedure, sufficient to bring petitioner personally before the court in the Northern District?

POINTS AND AUTHORITIES

POINT I.

VENUE WAS PROPERLY LAID IN THE NORTHERN DISTRICT OF MISSISSIPPI.

1. Jurisdiction was founded solely on diversity of citizenship and the suit was brought in the district of plaintiff's residence.

Judicial Code Sec. 51 (28 U. S. C. A. 112);

McCormick v. Walther, 134 U. S. 41, 33 L. Ed. 833;

Shaw v. Quincy Mining Co., 145 U. S. 444, 36 L. Ed. 768;

Green v. C. B. & Q. R. R. Co., 205 U. S. 530, 51 L. Ed. 916;

Munter v. Weil Corset Co., 261 U. S. 276, 67 L. Ed. 652;

Seaboard Rice Milling Co. v. C. R. I. & P. R. R. Co., 270 U. S. 363, 70 L. Ed. 633;.

Stonite Prod. Co. v. Lloyd, 315 U. S. 561, 86 L. Ed. 1026.

2. The defendant was not a resident of the Southern District of Mississippi within the meaning of Sec. 52 of

the Judicial Code (28 U. S. C. A. Sec. 113), because a corporation can be a resident or inhabitant only of the state in which it has been incorporated.

Shaw v. Quincy Mining Co., 145 U. S. 444, 36 L. Ed. 768;

Galveston H. & S. R. R. Co. v. Gonzales, 151 U. S. 495, 38 L. Ed. 248;

In re: Keasby Milling Co. 160 U. S. 221, 40 L. Ed. 402;

Seaboard Rice Milling Co. v. C. R. I. & P. R. R. Co., 270 U. S. 363, 70 L. Ed. 633;

Neirbo v. Bethlehem Shipbuilding Corp. 308 U. S. 165, 84 L. Ed. 167;

Ward v. Studebaker Sales Co., 113 Fed. (2d) 567.

3. By appointing a resident agent for the service of process pursuant to Mississippi law the defendant waived all requirements as to venue.

Mississippi Code 1942, Sec. 5319;

Sanford v. Dixie Construction Co., 157 Miss. 627, 129 So. 887;

Tri-State Transit Co. v. Mundy, 194 Miss. 714, 12 So. (2d) 920;

Neirbo v. Bethlehem Shipbuilding Corp., 308 U. S. 165, 84 L. Ed. 167;

Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U. S. 4, 84 L. Ed. 537;

Mass. Bonding & Insurance Co. v. Concrete Steel Bridge Co., 37 Fed. (2d) 695 (4th Cir.);

Coastal Club v. Shell Oil Co., 45 Fed. Supp. 859 (D.C. La.);

Barnes v. Wilson & Co., 40 Fed. Supp. 689 (D.C. Wis.);

Williams v. James, 34 Fed. Supp. 61 (D.C. La.).

POINT II.

JURISDICTION OVER THE PERSON OF PETITIONER WAS OBTAINED THROUGH SERVICE OF PROCESS ON ITS AGENT IN THE SOUTHERN DISTRICT OF MISSISSIPPI, PURSUANT TO RULE 4(f) FEDERAL RULES OF CIVIL PROCEDURE.

1. The purpose and intent of Rule 4(f) is to afford a means of serving process in cases similar to that at bar. Rules of Civil Procedure, Rule 4(f);

Proceedings of Washington and New York Institute on Federal Rules, pages 291-292 (Judge Donworth's address);

Moore's Federal Practice, Vol. I, page 361;

Hughes Federal Practice, Vol. 17, page 200, Sec. 18, 992;

2. Rule 4(f) is procedural, and does not extend either the jurisdiction or the venue of the court.

Advisory Committee's report to the Supreme Court April, 1937, note to Rule 4(f);

Hughes Federal Practice, Vol. 17, page 201, Sec. 18, 993;

Moore's Federal Practice, Vol. I, page 360;

Proceedings of Cleveland Institute on the Federal Rules, pages 305-206 (Dean Clark's address);

Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359, 71 L. Ed. 684;

Sibback v. Wilson & Co., 312 U. S. 1, 85 L. Ed. 479;

Schwartz v. Aircraft Silk Hosiery Mills, 110 Fed. (2d) 465;

Contracting Division A. C. Horne vs. New York Life Insurance Co., 113 Fed. (2d) 864;

O'Leary v. Lofton, 3 F.R.D. 36 (D.C. N.Y.);

Andrus v. Younger Bros., 49 Fed. Supp. 499 (D.C. La.);

Coastal Club v. Shell Oil Co., 45 Fed. Supp. 859 (D.C. La.);

Totus v. United States, 39 Fed. Supp. 7;

Saivatori v. Miller Music, Inc., 35 Fed. Supp. 45 (D.C. N.Y.);

Williams v. James, 34 Fed. Supp. 61 (D.C. La.);

Zwerling v. New York & Cuba Mail S. S. Co. 33 Fed. Supp. 721 (D.C. N.Y.);

Gibbs v. Emerson Electric Co., 31 Fed. Supp. 983 (D.C. Mo.);

Gibbs v. Emerson Electric Co., 29 Fed. Supp. 810 (D.C. Mo.);

Devier v. George Cole Motor Co., 27 Fed. Supp. 978 (D.C. Va.).

3. By appointing a resident agent for service of process pursuant to the laws of Mississippi, petitioner consented that service upon that agent would confer jurisdiction over its person.

Mississippi Code 1942, Sec. 5319;

Sanford v. Dixie Construction Co. 157 Miss. 627, 128 So. 887;

Tri-State Transit Co. v. Mundy, 194 Miss. 714, 12 So. (2d) 920;

Toland v. Sprague, 12 Peters 300, 9 L. Ed. 1093;

LaFayette Insurance Co. v. French, 18 How. 404, 15 L. Ed. 451;

St. Clair v. Cox, 106 U. S. 350, 27 L. Ed. 222;

Mutual Reserve Fund v. Phelps, 190 U. S. 147, 47 L. Ed. 927;

Pennsylvania Fire Insurance Co. v. Gold, 243 U. S. 93, 61 L. Ed. 610;

Hess v. Pawlowski, 274 U. S. 352, 71, L. Ed. 1093;

Smolik v. Philadelphia & Reading Coal & Iron Co., 222 Fed. 148;

Ex Parte Schollenberger, 96 U. S. 369, 24 L. Ed. 853;

Neirbo v. Bethlehem Shipbuilding Corp., 308 U. S. 165, 84 L. Ed. 167;

Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U. S. 4, 84 L. Ed. 537.

POINT III.

RESPONDENT IS A RESIDENT OF THE NORTHERN DISTRICT.

1. The trial court's finding that respondent was a resident of the Northern District was based on substantial evidence and will not be disturbed by this court.

United States v. Chemical Foundation, 272 U. S. 1, 81 L. Ed. 131;

United States v. McGowan, 290 U. S. 592, 78 L. Ed. 522;

Alabama Packing Co. v. Ickes, 302 U. S. 464, 82 L. Ed. 374;

General Talking Picture Corp. v. Western Electric Co., 304 U. S. 175, 82 L. Ed. 1273.

2. The trial court's finding is in accord with applicable decisions of this court and with the applicable statute and decisions of the Supreme Court of Mississippi.

Morris v. Gilmer, 129 U. S. 315, 32 L. Ed. 690;

District of Columbia v. Murphy, 314 U. S. 441, 86 L. Ed. 329;

McHenry v. State, 119 Miss. 289, 80 So. 765;

Clay v. Clay, 134 Miss. 658, 90 So. 181;

Bilbo v. Bilbo, 180 Miss. 536, 177 So. 722;

Smith v. Deere, 195 Miss. 502, 16 So. (2d) 33;

Mississippi Code 1942, Sec. 4055.

ARGUMENT

I.

VENUE WAS PROPERLY LAID IN THE NORTHERN DISTRICT OF MISSISSIPPI, BECAUSE JURISDICTION WAS FOUNDED SOLELY ON DIVERSITY OF CITIZENSHIP AND THE SUIT WAS BROUGHT IN THE DISTRICT OF THE RESIDENCE OF PLAINTIFF.

Prior to 1887 the general venue statute provided that no civil suit could be brought against any person "in any other district than that whereof he is an inhabitant, or in which he shall be found." The Act of 1887 omitted the words "in which he shall be found," and added the presently existing provision that where jurisdiction is founded solely on diversity of citizenship, "suit shall be brought only in the district of the residence of either the plaintiff or the defendant." Judicial Code Sec. 51 (28 U.S.C.A. Sec. 112).

The meaning and effect of this amendment was discussed by Mr. Justice Gray in *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 36 L. Ed. 768, as follows:

"The Act of 1887, both in its original form and as corrected in 1888, re-enacts the rule that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant, but omits the clause allowing a defendant to be sued in the district where he is found, and adds this clause: 'but where the jurisdiction is founded only on the fact that the action is between citizens of different states,

suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' 24 Stat. at L. 552; 25 Stat. at L. 434. As has been adjudged by this court, the last clause is by way of proviso to the next preceding clause, which forbids any suit to be brought in any other district than that whereof the defendant is an inhabitant; and the effect is that 'where the jurisdiction is founded upon any of the causes mentioned in this section, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but where the jurisdiction is founded solely upon the fact that the parties are citizens of different states, the suit may be brought in the district in which either the plaintiff or the defendant resides.' "

"The statute now in question, as already observed, has repealed the permission to sue a defendant in a district in which he is found, and has peremptorily enacted that 'where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' In a case between natural persons, as has been seen, this clause does not allow the suit to be brought in a state of which neither is a citizen. If Congress, in framing this clause, did not have corporations in mind, there is no reason for giving the clause a looser or broader construction as to artificial persons who were not contemplated, than as to natural persons who were. If, as it is more reasonable to suppose, Congress did have corporations in mind, it must

be presumed also to have had in mind the law, as long and uniformly declared by this court, that, within the meaning of the previous acts of Congress giving jurisdiction of suits between citizens of different states, a corporation could not be considered a citizen or a resident of a State in which it had not been incorporated."

Since the 1887 amendment was adopted, we have found no case wherein the court has held that venue was improperly laid in diversity of citizenship cases where suit was brought in the district of which the plaintiff was a resident. Some of the many cases holding that venue was properly laid in such instances are: **McCormick v. Walthers**, 134 U. S. 41, 33 L. Ed. 833; **Green v. C. B. & Q. R. R. Co.** 205 U. S. 530, 51 L. Ed. 916; **Munter v. Well Corset Co.**, 261 U. S. 276, 67 L. Ed. 652; **Seaboard Rice Milling Co. v. C. R. I. & P. R. R. Co.**, 270 U. S. 363, 70 L. Ed. 633; **Stonite Prod. Co. v. Lloyd Co.**, 315 U. S. 561, 86 L. Ed. 1026.

Implicit throughout the brief of petition is the vaguely concealed suggestion that in some way the *Neirbo* decision has changed the rule announced by these cases, at least, in so far as corporate defendants are concerned. The *Neirbo* case, however, does not disturb those decisions, but in effect, recognizes that no valid question could have been raised as to venue had the suit been brought in the district of the residence of the plaintiff; the first paragraph of the opinion in that case containing this sentence: "The suit was based on diversity of citizenship and was not brought in the district of the residence of either the plaintiff or the defendant." The lower court in that case ex-

pressly held, and as shown above, the holding to that extent was not disturbed by this court that "... had plaintiffs been residents of the Southern District of New York so that venue was properly laid, service of process upon the defendant would have been had by service upon its agent." *Neirbo v. Bethlehem Shipbuilding Corp.*, 103 Fed. (2d) 765, 770.

The ruling of the District Court was anchored on the proposition that the *Neirbo* case required adoption of the practical and realistic view that for purposes of venue foreign corporations "are domiciled in any district where they do business and have, in accordance with the mandate of state law, appointed agents for the service of process," and, therefore, the defendant within the meaning of Sec. 52 of the Judicial Code (28 U.S.C.A. Sec. 113), was "an inhabitant of the State of Mississippi and entitled to be sued in the District of the State where it resides. (R. p. 33). But it is well recognized that the words "inhabitant" and "resident" as the same are used in Secs. 51 and 52 of the Judicial Code are synonymous with the word "citizen" and all include the idea of domicile. A corporation is not and cannot be a citizen, an inhabitant or resident of a state in which it has not been incorporated. *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 36 L. Ed. 768; *Galveston H. & S. Railway Co. v. Gonzales*, 151 U. S. 495, 38 L. Ed. 248; *In re: Keasby Milling Co.*, 160 U. S. 221, 40 L. Ed. 402; *Seaboard Rice Milling Co. v. C. R. I. & P. R. R. Co.*, 270 U. S. 363, 70 L. Ed. 633.

As we read and understand the *Neirbo* case, it simply holds that in diversity of citizenship cases the privilege accorded a corporate defendant under the general venue

statute of being sued only in the district of which it is a resident, or in the district of the residence of the plaintiff, may be waived, and is waived where it does business in a foreign state and, pursuant to state law, appoints there an agent for service of process. The opinion in that case does not disturb the well established principle set forth in the cases cited above that within the meaning of the venue statutes "residence," "habitation" and "domicile" are synonymous in their meaning. Instead of disturbing that principle the case impliedly, at least, recognizes its validity; and even those members of the court who constituted the minority did not understand the main opinion to hold otherwise. Thus, in his dissenting opinion, Mr. Justice Roberts, at page 176, said:

"Whatever may be said in support of the original adoption of a different ruling it has been the law for a century that as respects the jurisdiction of Federal Courts over a corporation in diversity of citizenship cases, the corporation is a citizen and resident of the state of incorporation and no other state. I do not understand the court's opinion to repudiate the rule."

Although it would seem quite clear that the rationale of the Neirbo opinion simply is that by the appointment of an agent for the service of process in a state in which a foreign corporation is doing business, the corporation thereby waives the provisions of the venue statute, which it otherwise would be entitled to assert, and affirmatively consents to be sued in any of the courts of that State, yet a few courts have endeavored to read into the opinion something more than a holding of consent to be sued, and have suggested, as did the District Judge in this case, that

the foreign corporation by consenting to be sued in the courts of a state thereby became a resident of the State within the meaning of the venue statutes. Such was the construction placed upon the *Neirbo* case in *Moss v. Atlantic Coast Line Railroad Co.*, 149 Fed. (2d) 701 (2nd Circuit), a per curiam opinion, and the same thought was suggested by Mr. Justice Chase, also of the Second Circuit, in *Schwartz v. Artcraft Silk Hosiery Mills*, 110 Fed. (2d) 465. Such a construction arises, we think, from an effort at oversimplification. Many learned writers have suggested that such a holding would have constituted an easy and simple manner of disposing of a very troublesome problem, but they all concede that the *Neirbo* case was not so decided, and that any decision on such a basis would have to be made at the expense of long settled authority. Thus, in the case of *Ward v. Studebaker Sales Co.*, 113 Fed. (2d) 567, Justice Clark of the Third Circuit, in commenting on the views expressed by various learned writers as to the meaning and effect of the *Neirbo* case said:

"It may be observed that the writers above mentioned and their confreres are in hearty accord with the rationale of the *Neirbo* decision. As one observes, it is a step in the 'process of adjusting outmoded juristic stereotypes to the pragmatic need of exposing these business units to suit.' As all agree, it goes far toward removing the discriminatory advantage heretofore enjoyed by foreign corporations. For 'the effect of the pre-*Neirbo* rule was usually to provide a dodge for the corporation rather than to insure an appropriate place for trial.' The pundits above quoted from and cited to only regret that the United States Supreme Court did not feel free to go

the whole way in abandoning these 'outmoded juristic stereotypes.' As a writer in the Harvard Law Review puts it:

"The aura of discredit that surrounds fictional consent, plus the doubts as to the existence of actual waiver on the facts of the *Neirbo* case and the problematic validity of what results in deprivation by the state of federal venue privileges might persuade an iconoclastic court with a new 'way of looking at corporations' to adopt the more adequate rationale that a corporation established in business within a district is a 'resident' there within the meaning of Section 51. Unlike fictional consent, this construction would dispel any doubts as to its applicability to causes of action arising outside the state. This simplification of the problem would necessarily be at the expense of long-settled authority.' **Venue of Actions Against Foreign Corporations In The Federal Courts** (note), 53 Harvard Law Review 660, 664. If the court had felt so inclined, it might have written *finis* to the curious legal panorama presented by the attempt to fit the corporate ghost into the less spookish requirements of jurisdiction and venue."

This court has not yet held that a foreign corporation, by qualifying to do business in a state becomes a resident of such state within the meaning of the venue statutes, so as to permit it to be sued only in the district of that state wherein it does business; and we do not think that it will so hold, especially when such a holding would, as in the instant case, have the effect of depriving a citi-

zen of that state of the right which he theretofore had to bring the suit in the district of his residence.

Since Chief Justice Marshall rendered the opinion in *Gracie v. Palmer*, 8 Wheat. 699, 5 L. Ed. 719, it has been consistently held by the Federal Courts that the provisions of the general venue statute fixing the place where suits shall be brought, does no more than accord to the defendant a personal privilege respecting the venue, or place of suit, which he may assert or waive at his election. (See *Neirbo* case, *supra*, and discussion of the cases in Mr. Justice Frankfurter's opinion).

After the amendment in 1887, as the same was construed by the Supreme Court in *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 36 L. Ed. 768, and in *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 942, it was generally held that a corporation, by its act in appointing an agent for service of process, could not be held to have waived its right to be sued only in the district of which it was an inhabitant, or in the district of which the plaintiff was a resident; and, therefore, over its objection, it could not be subjected to suit in a Federal Court in any other district in which it did business or had appointed an agent for the service of process. This rule was in effect in the Fifth Circuit up until the *Neirbo* case was decided. *McLean v. Mississippi*, 96 Fed. (2d) 741, 119 A.L.R. 670.

The *Neirbo* case liberalized and broadened the legal concept of waiver. By appointing a process agent in a state foreign corporations agree affirmatively that service of process on that agent would confer jurisdiction over their person. But the waiver of venue comes about, not

by actual consent, but by fictional consent. So the case held that when a foreign corporation qualified to do business in a state, and in accordance with the laws of that state appointed an agent for the service of process, it not only consented the service of process on its agent gave jurisdiction over its person, but it also thereby waived the provisions of the venue statute which it otherwise would be entitled to assert and affirmatively consented to be sued in that state,—not only in the state courts but in the federal courts sitting therein, and not only by residents of the state, but by non-residents as well.

The Mississippi Statute provides that every foreign corporation doing business in the state shall appoint a resident agent upon whom service of process may be had in any suit against the corporation. (Sec. 5319 Code 1942, Appendix A p. 49 *infra*). It was in obedience to the mandate of this statute that defendant appointed its resident agent for service of process.

The Supreme Court of Mississippi has construed this statute as making the agent thus appointed, regardless of his actual residence or domicile, an agent for the service of process in any suit brought against the corporation in any county of the state, so that process may issue from the county in which the suit is brought, be served upon the resident agent in the county of his residence, and thereby the court obtains jurisdiction over the person of the defendant corporation. In other words, so far as the effectiveness of service of process is concerned the residence of the agent in contemplation of law, is in every county in the state. *Sanford v. Dixie Const. Co.*, 157 Miss. 627, 128 So. 887.

In the Sanford case suit was filed in Forrest County and process served on the resident agent of the defendant foreign corporation in Harrison County where the agent resided, and there it was held that the Circuit Court of Forrest County had jurisdiction of the suit and of the person of the defendant. In construing the statute the court remarked that where, pursuant to its provisions a foreign corporation has duly designated a resident agent, "process may be served in the same way and as easily and as certainl / and with as full and complete effect as upon a like agent of a domestic corporation;" (opinion p. 632) and the court then held that by this statute "it was the intention and it has the effect when a foreign private corporation has complied with it, to place the foreign private corporation in regard to venue in transitory actions in exactly the same attitude as a domestic corporation, and that its effect is to domesticate the said foreign private corporation for the purposes of suit and process—although for that purpose only." (Op. pp. 634-635).

And, accordingly, the Supreme Court of Mississippi in a later case held, that venue being properly laid in accordance with the State Statute, service of process on the resident agent of the foreign corporation in the county of his residence was valid, and the court acquired jurisdiction both of the subject matter and of the person of the defendant, even though the cause of action arose outside of the State of Mississippi. *Tri-State Transit Co. v. Mundy*, 194 Miss. 714, 12 So. (2d) 920.

The contract thus made between petitioner and the State of Mississippi, whereby it appointed a process agent, and in consideration of the protection given it by the state,

consented to be sued therein, was a real contract, and the consent thus given extended to any court sitting in the state which applies the laws of the state, which included the District Court of the United States for the Northern District of Mississippi. *Neirbo v. Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 84 L. Ed. 167; *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U. S. 4, 84 L. Ed. 537; *Mass. Bonding & Ins. Co. v. Concrete Steel Bridge Co.*, 37 Fed. (2d) 695 (4th Cir.); *Coastal Club v. Shell Oil Co.*, 45 Fed. Supp. 859, (D.C. La. 1942); *Barnes v. Wilson*, 40 Fed. Supp. 689 (D.C. Wis. 1941); *Williams v. James, etc.*, 34 Fed. Supp. 61 (D.C. La. 1940).

From the cases cited by petitioner it would appear that the argument is directed, not so much to the proposition that venue was improperly laid in this case, but rather to the proposition that the court had no jurisdiction over petitioner's person. With this in mind, consider the situation prior to the adoption of the Federal Rules of Civil Procedure, particularly in those cases where resident agents for the service of process had not been appointed. Under Sec. 51 of the Judicial Code, a plaintiff in cases where jurisdiction was dependent upon diversity of citizenship had the choice, as of right, to sue either in the district where he lived or in the district where the corporation was domiciled. But this choice was more fanciful than real. In practice the choice could be exercised and the plaintiff could sue in the district of his residence only if the corporation was doing business there and had an agent there upon whom process could be served. This was not because of any want of proper venue, but by reason of inability to acquire jurisdiction over the person of the defendant, because process could not run beyond the

boundaries of the district, and because process could not lawfully be served upon an agent of the corporation who might be found within the district unless the corporation was actually doing business there. Thus, in **Munter v. Weil Corset Co.**, 261 U. S. 276, 67 L. Ed. 652, a citizen of Connecticut filed suit in a district court of that state against a citizen of New York who was served with process in New York. This court held that venue was proper but that jurisdiction over the person of the defendant was not had because the process could not run beyond the boundaries of the district. And, in **Green v. C. B. & Q. R. R. Co.**, 205 U. S. 530, 51 L. Ed. 916, the plaintiff, a citizen of Pennsylvania, brought suit in a federal court in that state against the Railroad Company, an Iowa corporation, and the service of the process was had upon an agent of the Railroad Company in that district. This court held that venue was properly laid because the suit was brought in the district of plaintiff's residence, but that jurisdiction was not had over the person of the defendant, because it was not doing business in the District where the suit was filed. Other cases, myriad in number, announce the same principle and will be found cited in the petitioner's brief.

The discriminatory advantages thus enjoyed by foreign corporations were to a very large extent removed, and the evils arising thereby, to a large extent corrected, by the adoption of the Federal Rules of Civil Procedure, and were still further removed and corrected by the decision in the *Neirbo* case. One of the main purposes of Rule 4(f) of the Rules of Federal Procedure was to reach a situation precisely as that which is presented in this case. Thus, Judge Donworth of the Advisory Committee at the

New York Institute of Federal Rules explained its purposes, as follows:

"Rule 4(f) enlarged to some extent the former statutory rule. All process, other than subpoena, may be served anywhere within the territorial limits of the state in which the district court is held. For instance, you are a citizen of New York, residing in New York City, and you wish to sue a New Jersey corporation. That New Jersey corporation is doing business in Buffalo and it has an agent there but no agent in the Southern District of New York. You cannot sue that defendant in the Western District without its consent, because that district is not the residence of either the plaintiff or the defendant. Under this Rule 4(f) you may sue that corporation in the Southern District of New York and you may serve the agent in Buffalo. That does not extend the jurisdiction of this court at all, for the District Court for the Southern District always had jurisdiction, but until this rule became effective, you could not serve the summons in another district of this State. You would have to wait until the defendant corporation was found to have a properly authorized agent in this district." Proceedings of Washington and New York Institute on Federal Rules pp. 291-292.

It is to be noted that in the numerous cases cited by petitioner, holding that unless a foreign corporation was actually doing business in the State where suit was brought, service of process was not effective to confer jurisdiction over the person of the corporation, (St. Louis and S. W. R. R. Co. v. Alexander, 227 U. S. 218, 57 L. Ed. 468, and

Green v. C. B. & Q. R. R. Co., 205 U. S. 530, 51 L. Ed. 916 are examples) the corporation had not qualified to do business in the state and had not appointed an agent upon whom service of process might be had in suits brought against it. In the *Neirbo* case, the court held that by so doing the corporation consented to be sued, and by such consent also waived venue. This was not an actual waiver of venue, but a constructive consent which the court found to follow as a legal incident to the corporation's qualification to do business and its appointment of a process agent. How then can it be doubted that the district court in this case acquired jurisdiction over the person of the petitioner through service of process on its agent, when as to that matter it was not necessary to rely upon constructive or fictional consent, for the petitioner by its very act in appointing a process agent had affirmatively consented that service of process upon that agent should be effective to confer jurisdiction upon its person in any suit which might be brought within the state?

In the case of *Williams v. James, et al*, 34 Fed. Supp. 61 (D.C. La. 1940), the court discussed the effect of the *Neirbo* case in connection with the Louisiana statute providing for the appointment by foreign corporations of process agents, particularly in respect to the matter of acquiring jurisdiction over the person of the corporation through the service of process on its agent in a district other than that in which the suit was filed, and in the opinion at page 68 Judge Porterie said:

"Service on the Secretary of State is good service on the defendants, and brings their persons into the western district which has venue of the subject, be-

cause of the statute-contract each has agreed to be everywhere in the state. The Neirbo doctrine applied to the instant case places the person of each of the two defendants all over the state; provisions of law as to jurisdiction of person have been waived. The service on the physical person of the Secretary of State is only necessary because he is the one to send notice to the defendant—all of which has been done by the election and is for the convenience of the defendant."

In *Coastal Club v. Shell Oil Co.*, 45 Fed. Supp. 859 (D. C. La. 1942), the court in discussing the same problem said:

"The plaintiff has residence in this district; in the Neirbo case, *supra*, suit was not brought 'in the district of the residence of either the plaintiff or the defendant.' Granting that Judicial Code, Section 51, 28 U.S.C.A. s. 112, has been interpreted by the courts to mean that suit may be brought in the district of the residence of the plaintiff, if the defendant be found therein and served with process (*Gutschalk v. Peck* D.C. 261 F. 212; *O'Neil v. Cooperative League of America*, D. C., 278 F. 737; *Hughes Federal Procedure*, Hornbook Series, 2nd Ed. 1913, §104, p. 264; *Simpkins Federal Practice*, Revised Ed. 1923, p. 350) a long and well established rule—we are of the opinion that under the statute-contract, statewide in effect, the defendant is found in this district. And this last conclusion we take from the Neirbo doctrine."

In the instant case it is not necessary that resort to the Neirbo decision be had in order to reach the conclusion

which Judge Porterie reached in the two cases cited above. That the statute-contract is state-wide in effect and that, so far as the effectiveness of service of process is concerned, the residence of the agent is in every county in the state so that service of process upon him wherever he resides, gives jurisdiction over the person of the corporation is settled by the decisions of the Supreme Court of Mississippi. hereinbefore referred to and discussed.

Under petitioner's Point IV it is argued that the consent to be sued, which flows from the appointment of a resident agent for service of process, is circumscribed and limited by the provisions of the State Venue Statute; and accordingly that this suit could be maintained only in a United States District Court which embraces a county in which venue would be proper had the suit been brought in the state court. This point was elaborately presented and argued in the Circuit Court of Appeals and was there summarily disposed of by the remark that "it is Hornbook law that where a Federal Statute fixes the venue of the Federal Courts, state laws are not applicable." (T. p. 56).

To support the novel argument thus made by petitioner a number of cases are cited, none of which are in point. The idea apparently springs from a misconception of the *Nierbo* and *Oklahoma Gas Co.* decisions, and particularly from a misconception of the meaning of a quotation from *Cohen v. American Window Glass Co.*, 126 Fed. (2d) 111, (Brief p. 67) in which Judge Clark refers to the "trend toward allowing state laws to govern jurisdiction and venue over foreign corporations." This same thought is expressed by a writer in the *Harvard Law Review*, in which he speaks of "deprivation by the state of

federal venue privileges." (Venue of actions against Foreign Corp. in the Federal Court, 53 Harvard Law Review 660, 664). But a reading of that opinion will show that Judge Clark did not mean that the trend was toward allowing state law to govern jurisdiction and venue in Federal Courts in the sense that the state venue statute would control to the exclusion of the federal venue statute, but rather in the sense that compliance with a state statute requiring the appointment of a resident agent for the service of process constituted a waiver by the corporation of federal venue privileges; and to that extent the state statute affected jurisdiction and venue. Both Judge Clark and the writer in the Harvard Law Review had in mind the same thing, namely, that the Neirbo case extended and broadened the doctrine of jurisdiction-by-implied-consent.

In *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 100 Fed. (2d) 770 the suit was brought in a district embracing a county in which suit could have been brought under the state law, but that circumstance did not, in any wise influence the decision. Thus, this court in its opinion said:

"Prior to this suit, Wilson & Co. had, agreeable to the laws of Oklahoma, designated an agent for service of process 'in any action in the State of Oklahoma.' Both courts below found this to be in fact a consent on Wilson & Co.'s part to be sued in the courts of Oklahoma upon causes of action arising in that state. The Federal District Court is, we hold, a court of Oklahoma within the scope of consent, and for the reasons indicated in *Neirbo v. Bethlehem Shipbuilding Corporation* decided Nov. 22, 1939, 308 U. S. 165; 84

L. Ed. 167, 60 S. Ct. 153, Wilson & Co. was amenable to suit in the Western District of Oklahoma." (*Oklahoma Packing Co. v. Oklahoma Gas and Electric Co.*, 309 U. S. 4, 84 L. Ed. 537, 539).

In *Dehne v. Hillman Investment Co.*, 110 Fed. (2d) 456 (Cir. 3), and in *Ward v. Studebaker Sales Corp.*, 113 Fed. (2d) 567 (Cir. 3), it was held that the appointment of a resident agent for the service of process pursuant to the laws of Pennsylvania constituted, under the doctrine of the *Neirbo* case, a waiver of the corporation's privilege under the Federal Venue Statute of being sued only in the district of which it was an inhabitant. Nothing in either of those decisions suggested that the implied consent which arose from the appointment of such agent for service of process was limited or circumscribed by the State Venue Statute.

An acceptance of petitioner's theory would mean that by some alchemy "waiver of privilege" is transmuted into "acquisition of right." But waiver connotes the surrender of a right or privilege, not its acquirement. Each is the antithesis of the other. The argument would be perhaps more plausible if the respondent were a non-resident of the State of Mississippi; but as applied to the facts in the case at bar, acceptance of such a theory would mean that by consenting to be sued in the district where it does business, petitioner thereby not only acquired the right not to be sued elsewhere in the state, a right which it theretofore did not have; but also deprived the respondent of a right which he theretofore did have, namely, the right under the Federal Venue Statute of bringing the suit in the district of his residence. Petitioner's theory finds no

support in any of the reported cases; it has no logical basis, and we do not think it will be accepted by this court.

II.

JURISDICTION OVER THE PERSON OF PETITIONER WAS OBTAINED THROUGH SERVICE OF PROCESS ON ITS AGENT IN THE SOUTHERN DISTRICT PURSUANT TO RULE 4(f) FEDERAL RULES OF CIVIL PROCEDURE.

Process was issued by the Clerk of the Northern District, directed to the marshal of the Southern District, and by him was served upon H. V. Watkins, Jr., a resident of the Southern District, who pursuant to the provisions of the Mississippi law had been appointed agent of the petitioner for receiving service of process. The issuance and service of process was pursuant to the provisions of Rule 4(f) of the Federal Rules of Civil Procedure, and was regular in every respect; and unless by this method of service the general jurisdiction or the venue of the court was extended, or unless the Rule itself was beyond the ambit of this court's authority, as measured by the Act of Congress delegating to it the power to prescribe the rules, then jurisdiction over petitioner's person was had thereby.

We think it cannot be questioned that the intent of the Rule was to reach just such a case as is here presented. Its clear and unmistakable wording shows this to be true. The illustrative example given by Judge Donworth of the Advisory Committee, in his address at the New York and Washington Institute on the Rules (quoted *supra* p. 20) in all its essential particulars, is identical with the case

at bar. Judge Donworth's conception of the purpose and meaning of the rule is shared by learned text writers on the subject. Thus, in Moore's Federal Practice, Vol. 1, page 361, it is said:

"Rule 4(f) removes the difficulties surrounding the service of process in actions brought in a district court held in a state containing more than one district. Rule 4 (f), as pointed out in the discussion of Rule 4(d) (1) and Rule 4(d) (3), is aimed chiefly at cases where a statutory agent is designated by state law to receive service of process for foreign corporations, and nonresident individuals, such as nonresident motorists and nonresident sellers of securities. Prior to the adoption of Rule 4(f) the situation in states with two or more districts was substantially as follows: There are two districts, A and B. The plaintiff resides in A and the statutory agent resides in B. Under the state law the action may be instituted in the state court and service of process validly effected by serving the agent anywhere within the state. The state statute, which designates a person as a statutory agent upon whom service of process can be made, is applicable in the federal courts; but not the state statute which allows process to run throughout the state. If the plaintiff instituted his action in district B, no difficulty as to service beyond the district was encountered, but the venue was wrong since neither the plaintiff nor the defendant resided in that district. If the action was instituted in district A, the venue was proper, but service had to be made beyond the district unless the agent happened to be found within the district. The cases of the lower federal courts were con-

flicting. At least one case held that service of process issuing out of the district court of A could be validly made in B, holding that the defendant is deemed to have consented, or at least cannot be heard to object, to service upon the agent anywhere within the state. Several other cases, however, refused to adopt that view and held that process issuing out of the district court of A could not be validly served in B, while a few other cases held the service invalid because made by the marshal of A, who was held to have no authority to make service outside of A. Rule 4(f) removes the difficulty as to the validity of service outside the district but within the state and coupled with Rule 4(c) and §503, 28 U.S.C.A. which permit the marshal of either district to make valid service, prevents any question arising as to whether the proper marshal served the process."

In Hughes Federal Practice Vol. 17, page 200, Sec. 18, 992, the author says:

"Formerly, process could be served only within the district of which it was issued, unless there was some form of statutory authorization for other service outside of the district and then such service could be made only by the marshal of the district in which service was to be made. This led to many difficult problems, particularly where the plaintiff resided in one district in a state and desired to sue a non-resident having an agent for the purpose of suit in another district of the state. If suit was brought in the district in which the agent resided, where service could validly be made, there was not proper venue, since

neither the plaintiff nor the defendant resided there, although the defendant's agent lived there; but if suit were brought in the district where the plaintiff lived, the venue was proper but there could not be effective service on the defendant or the defendant's agent. By the change in practice effected by Rule 4(f), this difficulty is overcome."

The purpose of the rule, then, being clear, does it extend either the jurisdiction or the venue of the District Court, or does it affect substantive rights rather than matters of procedure? We think not.

In many instances the Federal Statutes provide for service of process beyond the boundaries of the state, or within the state, but beyond the boundaries of the district. (See Advisory Committee notes to Rules 4(e), 4(f)). District courts also have the power (28 U.S.C.A. Sec. 654) to issue subpoenas for witnesses in criminal cases to be served anywhere throughout the country. But, it has never been suggested that the right thus given by statute to have process run beyond the boundaries of the district, and even beyond the boundaries of the state in any wise added to the jurisdiction of the district courts, so as to make the practice contrary to the doctrine of territorial limitations announced in *Toland v. Sprague*, 12 Peters 300, 9 L. Ed. 1093, and other cases following it. Thus, in *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359, 71 L. Ed. 684, 689, the court said:

"That Congress may, in the exercise of its legislative discretion fix the venue of a civil action in a federal court in one district, and authorize the process to

be issued to another district in which the defendant resides or is found, is not open to question."

The Act of Congress authorizing promulgation of the Rules of Civil Procedure provided that the Supreme Court should prescribe by such rules the practice and procedure in civil actions at law, but that they should "neither abridge, enlarge nor modify the substantive rights of any litigant." (28 U.S.C.A. Sec. 723 (b)). In *Sibbick v. Wilson & Co.*, 312 U. S. 1, 85 L. Ed. 479, this court had under consideration the validity of Rules 35 and 37 which provided for the physical and mental examination of litigants. It was held that these rules did not nullify, or infringe upon any substantive right of the parties, but in fact were procedural only, and, therefore, were within the power delegated to the Supreme Court by Congress:

"Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States; but it has never essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where the cause of action arose." (Op. p. 10).

"In the instant case we have a rule which, if within the power delegated to this court, has the force of a federal statute." (Op. p. 13).

"The test must be whether a rule really regulates procedure,—the judicial process for enforcing

rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. That the rules in question are such is admitted." (Op. p. 14).

"The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose. Evidently the Congress felt the rule was within the ambit of the statute as no effort was made to eliminate it from the proposed body of rules, although this specific rule was attacked and defended before the committee of the two Houses. The Preliminary Draft of the rules called attention to the contrary practice indicated by the Bostford Case, as did the Report of the Advisory Committee, and the Notes prepared by the Committee to accompany the final version of the rules. That no adverse action was taken by Congress indicates, at least, that no transgression of legislative policy was found. We conclude that the rules under attack are within the authority granted." (Op. pp. 14-15).

It is also to be noted that the Advisory Committee's report to the Supreme Court of April, 1937, in the note to Rule 4(f) raised the question whether this Rule might not extend the jurisdiction or venue of the District Court, but nevertheless the Rule was adopted without change. Text writers, and other students of the subject have noticed and discussed the question and seem agreed that the rule is

procedural and does not enlarge either jurisdiction or venue. Thus, in Hughes Federal Practice, Vol. 17, Sec. 18993, the author says:

"The question has been raised by some writers as to whether this provision of Rule 4 does not go beyond the procedural limits of the Enabling Act. The argument made on this question is that by extending the limits within which service may be made, the rule extends the power of the District Court and enables it to bring before it defendants who could not otherwise be served. However, the Advisory Committee expressly raised this question in a note to the Supreme Court and, since the rule was adopted in the form in which the Committee had submitted it, it may be presumed that the court felt that there was no merit to the objection.

"In this connection it is interesting to note the statement of Dean Clark, Reporter to the Advisory Committee, that the rules make a distinction between 'the persons who may be served with process and the question of venue or jurisdiction' so that the plaintiff must still decide in which District Court he will bring his action, if he has a choice by reason of some statute allowing suit to be brought in the district of the defendant's residence or in the district where he does business. Dean Clark then added:

"if, under the rules of venue, suit may be brought in the district court, then it is possible that there may be a slight extension of the persons who may be summoned in the action, but this is only on the question of service of process. * * *"

"Perhaps I might add this, that some people have argued that venue is a broad enough term to include this matter of service of process. I suppose there is a possibility of argument that it conceivably might be so held, but we do not think that is the case. We are of the opinion that venue does not include this matter of service of process."

"The lower Federal Courts are not in harmony on the question, but on the whole the views expressed by Dean Clark seem sound, and there is no extension of jurisdiction or venue."

Professor Moore in his splendid treatise on the Rules, Vol. I, page 360, used similar language saying:

"Except when otherwise provided by a federal statute, service of process of each district court generally was valid only when served within the district. Rule 4(f) in extending the authority to serve the process of a district court beyond the district but within the territorial limits of the state in which it is held is not a very extensive change except in the case of the summons. While the rule is clearly desirable, some lawyers, as pointed out by the Advisory Committee, have questioned the power of the court to promulgate this rule. The rule in no way alters venue requirements; nor does it enlarge the district court's jurisdiction over the subject matter. It does permit a district court to gain personal jurisdiction over a defendant in situations where it could not have done so prior to the adoption of the Federal Rules. Since the Advisory Committee specifically called the atten-

tion of the Supreme Court to the question of its power to promulgate this rule, it may be safely assumed that the Supreme Court, by promulgating the rule, has concluded that it has the power."

This quotation makes it clear that Rule 82, providing that nothing in the Rules should be construed to extend or limit the jurisdiction of the district courts has application to jurisdiction of the subject matter of those courts, rather than jurisdiction over the person of the parties litigant therein. Dean Clark, Reporter for the Advisory Committee, also stressed this same point in his address before the Cleveland Institute on the Rules, saying:

"The question has been raised whether this is not a substantive change, one affecting jurisdiction and venue. I might say on that, it is our theory that definitely it is not. This is not a matter of either the jurisdiction of the court, what matters the court shall hear and decide, or of the venue, which is the place where certain kinds of action shall be tried. This affects neither one of those points. It simply says that in cases where the district court already has jurisdiction and venue its process may reach as far as the confines of that state itself. In other words, that is why we consider it procedural. It is simply allowing people to be brought before the court within the entire state and not merely within one District." Proceedings from the Cleveland Institute on the Federal Rules (1938) 205-206.

In *Williams v. James* (D. C. La.) 34 Fed. Supp. p. 61 Judge Porterie said:

"Objections to the validity of Rule 4(f) were specifically presented to the Supreme Court of the United States: that it enlarged the jurisdiction. See the Report of the Advisory Committee (April, 1937) 14: 'Some members of the bar question the power of the Court to make this extension.' Yet the Supreme Court of the United States left Rule 4(f) untouched. After the Rules were promulgated and reported by the Court to the Congress, the Congress adopted them intact. This, we say, was a congressional sanction of enactment.

" 'This story of the birth of Rule 4(f) is given far-reaching significance and great value by the case of *Sibback v. Wilson & Co.*, (C.C.A. 7th, 1939) 108 F. (2d) 415 (rev'd on other grounds (1941) 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479), wherein Rule 35(a), having been adopted in like circumstances as Rule 4(f), was declared to be a legislative enactment—the equivalent of a statute of Congress. The case holds these facts of preparation, promulgation and enactment, and, particularly, with Rule 82 providing that jurisdiction and venue shall remain unaffected, to prove that both Congress and the Supreme Court interpreted Rule 35(a) as not abridging substantive rights. Likewise, therefore Rule 4(f) is not an abridgement of substantive rights.' "

The decisions of the district courts are in conflict on the question whether, in the situation here presented, service of process pursuant to Rule 4(f) is effective to confer on the court personal jurisdiction over the defendant. The following district court decisions are in accord with the

decision of the Circuit Court of Appeals in this case. **Devier v. George Cole Motor Co.**, 27 Fed. Supp. 978 (D.C. Va.); **Gibbs v. Emerson Elec. Co.**, 29 Fed. Supp. 810 (D.C. Mo.); **Gibbs v. Emerson Elec. Co.**, 31 Fed. Supp. 983 (D.C. Mo.); **Zwerling v. New York & Cuba Mail S. S. Co.** 33 Fed. Supp. 721 (D.C. N.Y.); **Williams v. James**, 34 Fed. Supp. 61 (D.C. La.); **Salvatori v. Miller Music, Inc.**, 35 Fed. Supp. 845 (D. C. N.Y.); **Totus v. United States**, 39 Fed. Supp. 7 (D.C. Wash); **Coastal Club v. Shell Oil Co.**, 45 Fed. Supp. 859 (D. C. La.); **Andrus v. Younger Bros.**, 49 Fed. Supp. 499 (D. C. La.) and **O'Leary v. Lofton**, 3 F.R.D. 36 (D.C. N.Y.). The following District Court cases take the contrary view:

Melekov v. Collins, 30 Fed. Supp. 158 (D.C. Calif.); **Carby v. Greco**, 31 Fed. Supp. 251 (D.C. Ky.); **Richards v. Franklin County Distilling Co.**, 38 Fed. Supp. 513 (D.C. Ky.).

The only Circuit Court of Appeals decision directly in point is **Schwartz v. Artcraft Silk Hosiery Mills**, 110 Fed. (2d) 465 (2nd Cir.), and it is in accord with the decision rendered by the Circuit Court of Appeals in this case. Petitioner, however, cites **Sewchulis v. Lehigh Valley Coal Co.**, 233 Fed. 422, and **Contracting Division A. C. Horne v. New York Life Insurance Co.**, 113 Fed (2d) 864, both of which are also from the Second Circuit. The **Sewchulis** case was decided prior to the adoption of the Federal Rules of Civil Procedure. The **Contracting Division** case involved the question of venue in a patent infringement suit, wherein one of the parties was served with process in another district of the same state. No point was made that jurisdiction of the person was not acquired by this service, and such apparently was conceded; but the court held that the

venue statute governing patent cases did not permit the suit to be proceeded with against that defendant, venue in such cases being limited to the district of defendants residence, or where the patent was infringed, and the defendant had an established place of business. By implication, at least, the case supports the decision of the Circuit Court of Appeals in this case. Certainly there is nothing to indicate a ruling at variance with that expressed in **Schwartz v. Artcraft Silk Hosiery Mills**, *supra*, decided by the same Circuit less than five months previous thereto.

Petitioner relies mainly upon **Carby v. Greco**, 31 Fed. Supp. 251, and **Richards v. Franklin County Distilling Co.**, 38 Fed. Supp. 513, both from the Western District of Kentucky and decided by Judge Miller. In **Carby v. Greco** suit was filed in the District Court for the Western District of Kentucky, plaintiff's residence, against two individuals who were citizens of Alabama. Process was served upon the Secretary of State, a resident of the Eastern District, who pursuant to the Kentucky Statute was made agent for the service of process in suits against non-residents involved in motor vehicle accidents occurring within Kentucky. The court held that the District Court had jurisdiction over the subject matter and that venue was proper, but that no jurisdiction was acquired over the person of the defendants. The holding of lack of personal jurisdiction was based on the theory that such service under Rule 4(f) extended the jurisdiction of the court contrary to the doctrine announced in **Toland v. Sprague**, and thereby infringed upon substantive rights of the defendants. It is obvious that Judge Miller construed the words "jurisdiction of the district court" contained in Rule 82, as embodying jurisdiction of the person as well as jurisdiction of

the subject matter, and thereby reached the erroneous conclusion that Rule 4(f) as applied to the facts in that case affected substantive rather than procedural matters.

When *Richards v. Franklin County Distilling Co.* was decided this court had rendered its opinion in *Sibback v. Wilson & Co.*, 312 U. S. 85 L. Ed. 479. That decision shook Judge Miller's confidence as to the correctness of his decision in *Carby v. Greco*, but not sufficiently to cause him to depart therefrom. Thus, he says (p. 515):

"Plaintiff urges upon the court that its previous ruling in the *Carby* case should be reconsidered and revised, in light of the more recent opinion of the Supreme Court in *Sibback v. Wilson & Co.*, 61 S. Ct. 422, 85 L. Ed.—decided January 13, 1941. That case had under consideration the validity of another rule and is in point only in so far as it holds that the Federal Rules of Civil Procedure, including Rule 4(f), have the force and effect of a statutory enactment. Plaintiff therefore contends that Rule 4(f) is a statutory enactment and therefore supersedes the earlier rule established by the case above referred to. I agree that Rule 4(f) has the effect of a statutory enactment, but this also means that Rule 82 likewise has the effect of a statutory enactment. Accordingly, the question still remains for decision as to the combined effect of both Rules 4(f) and 82. This question will no doubt repeat itself often and it is hoped that it will be ruled upon by one of the higher courts in the near future, as it should be applied uniformly throughout the federal courts. In the absence of any such ruling at the present time, and in view of conflicting decisions from Dis-

trict Courts, I see no reason to depart from my former holding in *Carby v. Greco*, supra."

In any event, however, Judge Miller did not decide *Richard v. Franklin County Distilling Co.*, on the ground that service of process upon the co-defendant in an adjoining district was insufficient to bring the person of that defendant before the court, but the decision was based squarely on the proposition that such defendant was not subject to suit in the Western District because venue as to it was absent; saying that "the right of a defendant to object to the venue or place of trial is not affected by the fact that the co-defendant is properly before the court," and, therefore, since venue was absent the case could not be proceeded with as to that defendant. Compare *Neirbo v. Bethlehem Shipbuilding Corp.* 308 U. S. 165, 84 L. Ed. 167.

Service of process upon the petitioner in the instant case did not enlarge either the jurisdiction or the venue of the court; nor were any substantive rights of petitioner infringed upon. Jurisdiction was present because of diversity of citizenship of the parties; and venue was present because the suit was brought in the district court of the residence of the plaintiff. Petitioner admittedly was doing business in the State of Mississippi and had appointed a resident agent there for the service of process. Under the decisions of the Mississippi Supreme Court, the residence of the agent, in contemplation of law, was in every county in the state, and the corporation, for the purpose of suit and process was in exactly the same attitude as a domestic corporation. *Sanford v. Dixie Const. Co.*, 157 Miss. 627, 128 So. 887. By such appointment the corporation expressly consented that service of process upon its agent would give

the court jurisdiction over its person. As was said by Mr. Justice Frankfurter in the *Neirbo* case, quoting from the opinion of Judge Cardoza construing the New York Statute, the contract "means that whenever jurisdiction of the subject matter is present, service on the agent shall give jurisdiction of the person." And such a conclusion, in the case at bar, is to be reached without regard to the doctrine of fictional consent, which in the *Neirbo* case was held to embrace a waiver of venue; for here venue is present, and its waiver through such a constructive or fictional consent is not involved. In the case at bar the consent was actual and affirmative; the contract was that service of process upon the agent should give jurisdiction over the person of the corporation. So there is presented here nothing more than a matter of procedure, whereby pursuant to Rule 4(f) process was served upon petitioner's agent, and its person brought before the court.

Toland v. Sprague, 12 Peters 300, 9 L. Ed. 1093; *Munter v. Weil Corset Co.*, 261 U. S. 276, 67 L. Ed. 652; *Robertson v. Railroad Labor Board*, 268 U. S. 619, 69 L. Ed. 1119, and *Employers Reinsurance Corp. v. Bryant*, 299 U. S. 374, 81 L. Ed. 289 are cited by petitioner in support of the argument that Rule 4(f) as applied to the facts in this case extends the jurisdiction of the court. None of those cases support the asserted proposition.

In *Toland v. Sprague*, the defendant was a resident of Gibraltar, and jurisdiction of his person was sought to be had through attachment proceedings. The court held that such proceedings did not confer jurisdiction over the defendant's person, because there was no statute authorizing the same. However, the defendant appeared and it was

further held that he thereby waived jurisdiction of his person.

In *Munter v. Weil Corset Co.*, and also in *Robertson v. Railroad Labor Board*, the defendants were non-residents of the State where the suit was brought, and process was served on them beyond the boundaries of the state; and there being no statute authorizing such service, it was held that no jurisdiction was acquired over their persons.

In *Employers Reinsurance Corp. v. Bryant*, process was served on the defendant's agent in a district other than that in which the suit was brought, and the court held that this did not confer jurisdiction over the defendant's person since the statute did not authorize service of process beyond the boundaries of the district. If Rule 4(f) had been in effect when this case was decided service of process would have been valid, and jurisdiction of the defendant's person would have been had. This the petitioner concedes (Brief p. 46, 52).

Another most cogent reason why those cases have no application here is that in none of them was there involved the matter of a consent to be sued, i. e., a consent that service of process on the agent would confer personal jurisdiction over the corporation. In *Toland v. Sprague* it was held that a general appearance was a waiver of jurisdiction over the person, and, except as modified by the Rules of Civil Procedure such has always been the rule of the federal courts. How much stronger then is the case, where as here, there is an actual and affirmative consent, rather than a fictional or constructive consent, or waiver, derived from a general appearance. In *Lafayette Insurance Co. v.*

French, 18 How. 404, 15 L. Ed. 451, the court had under consideration the effect of service upon a resident agent of an insurance company, who pursuant to the provisions of the Ohio law was its agent to receive service of process in suits brought against it in the state. The court said:

“Nor do we think the means adopted to effect this object are open to the objection that it is an attempt improperly to extend the jurisdiction of the State beyond its own limits to a person in another state.”

“We consider this foreign Corporation, entering into contracts made and to be performed in Ohio, was under an obligation to attend, by its duly authorized attorney, on the courts of that State, in suits founded on such contracts, whereof notice should be given by due process of law, served on the agent of the Corporation resident in Ohio, and qualified by the law of Ohio and the presumed assent of the Corporation to receive and act on such notice; that this obligation is well founded in policy and morals, and not inconsistent with any principle of public law; and that when so sued on such contract in Ohio, the Corporation was personally amenable to that jurisdiction; and we hold such a judgment, rendered after such notice, to be as valid as if the corporation had had its habitat within the State.” * * * *

In recognizing the possibility of a different rule where natural persons, or corporations not complying with the State law are concerned, the court said:

"We limit our decision to the case of a Corporation acting in a state foreign to its creation, under a law of that state which recognized its existence, for the purposes of making contracts there and being sued on them, through notice to its contracting agents. The case of natural persons, and of other foreign corporations, is attended with other considerations, which might or might not distinguish it; upon this we give no opinion."

In *Pennsylvania Fire Insurance Co. v. Gold*, 243 U. S. 93, 61 L. Ed. 610, this court had under consideration the question of whether a foreign corporation doing business in a state was subject to service of process in a suit there on a cause of action arising outside of the state. The court held that jurisdiction of the defendant's person was acquired by service on its designated agent, because it had consented thereto, saying:

"The construction of the Missouri statute thus adopted hardly leaves a constitutional question open. The defendant had executed a power of attorney that made service on the superintendent the equivalent of personal service. If by a corporate vote it had accepted service in this specific case, there would be no doubt of the jurisdiction of the state court over a transitory action of contract. If it had appointed an agent authorized in terms to receive service in such cases, there would be equally little doubt. *New York L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 37 L. Ed. 292, 13 Sup. Ct. Rep. 444. It did appoint an agent in language that rationally might be held to go to that length. The language has been held to go to that

length, and the construction did not deprive the defendant of due process of law even if it took the defendant by surprise, which we have no warrant to assert."

"But when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts. The execution was the defendant's voluntary act."

In *Pennsylvania Fire Ins. Co. v. Gold*, supra, Mr. Justice Holmes cited with approval *Smolik v. Philadelphia & Reading Coal & Iron Co.*, 222 Fed. 148 wherein Judge Learned Hand showed clearly the difference between the implied consent to be sued, which flows from a corporation's act in doing business within a state, and its express consent to be sued derived from the appointment, pursuant to the laws of the State, of a resident agent upon whom service of process might be served. In that case the suit was brought in a United States District Court in New York on a cause of action accruing in Pennsylvania, and service of process was had upon the defendant's resident agent. It was urged by defendant that, since the implied consent to be sued arising from doing business in New York did not, under decisions of this court (*Simon v. Southern Railway*, 236 U. S. 115, 59 L. Ed. 492, and *Old Wayne Life Association v. McDonough*, 203 U. S. 27, 51 L. Ed. 345) include a consent to be sued on causes of action arising out of the state, that its express consent to be sued should be limited in exactly the same way. The court held otherwise, saying:

"These two arguments, treated as mere bits of dialectic, lead to opposite results, each by unquestionable deduction, so far as I can see. One must be vicious, and the vice arises I think from confounding a legal fiction with a statement of fact. When it is said that a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all, because the corporation does not in fact consent; but the court, for purposes of justice, treats it as if it had. It is true that the consequences so imputed to it lie within its own control, since it need not do business within the state, but that is not equivalent to a consent; actually it might have refused to appoint, and yet its refusal would make no difference. The court, in the interests of justice, imputes results to the voluntary act of doing business within the foreign state, quite independently of any intent.

"The limits of that consent are as independent of any actual intent as the consent itself. Being a mere creature of justice it will have such consent only as justice requires; hence it may be limited, as it has been limited in *Simon v. Southern Railway*, supra, and *Old Wayne Insurance Co. v. McDonough*, supra. The actual consent in the cases at bar has no such latitudinarian possibilities; it must be measured by the proper meaning to be attributed to the words used, and where that meaning calls for wide application, such must be given. There is no reason that I can see for imposing any limitation upon the effect of section 1780 of the New York Code, and as a result I find that the consent covered such actions as these."

Other cases involving consent to be sued are: *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *Mutual Reserve Fund v. Phelps*, 190 U. S. 147, 47 L. Ed. 937; *Hess v. Pawlowski*, 274 U. S. 352, 71 L. Ed. 1095. See also: *Ex Parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853, *Neirbo v. Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 84 L. Ed. 167, and *Oklahoma Packing Co. v. Oklahoma Gas and Electric Co.*, 309 U. S. 4, 84 L. Ed. 537 where the consent to be sued, derived from appointment of a resident agent for service of process, was extended to include a waiver of venue, as well as a consent that service on the agent would confer personal jurisdiction over the corporation.

III.

THE RESPONDENT WAS A RESIDENT OF THE NORTHERN DISTRICT OF MISSISSIPPI.

On conflicting testimony the District Court found that the respondent was a resident of the Northern District. Not only was there substantial evidence to sustain this finding of fact, but the record makes it clear that the trial courts finding on this issue was correct. The Circuit Court of Appeals so held.

This court will not disturb findings of fact made by the trial court unless they are plainly without substantial support in the evidence. *United States v. Chemical Foundation*, 272 U. S. 1, 71 L. Ed. 131; *United States v. McGowan*, 290 U. S. 592, 78 L. Ed. 522; *Alabama Power Co. v. Tckes*, 302 U. S. 464, 82 L. Ed. 374; *General Talking Picture Corp. v. Western Electric Co.*, 304 U. S. 175, 82 L. Ed. 1273.

Moreover, the finding is in accord with applicable decisions of this court, and with the applicable statute and decisions of the Supreme Court of Mississippi. *Morris v. Gilmer*, 129 U. S. 315, 32 L. Ed. 690; *District of Columbia v. Murphy*, 314 U. S. 441, 86 L. Ed. 329; *McHenry v. State*, 119 Miss. 289, 80 Co. 765; *Clay v. Clay*, 134 Miss. 658, 90 So. 181; *Bilbo v. Bilbo*, 180 Miss. 536, 177 So. 722; *Smith v. Deere*, 195 Miss. 502, 16 So. (2d) 33; Mississippi Code 1942, Sec. 4055 (Appendix B, page 50 *infra*).

CONCLUSION

In this case venue was properly laid in the Northern District, because that was the residence of the plaintiff and jurisdiction was founded solely upon diversity of citizenship. The holding of the District Court that petitioner was a resident of the Southern District within the meaning of Sec. 52 of the Judicial Code is wholly without justification, because a corporation cannot be a resident or inhabitant of any state or district except that of its incorporation. Moreover, under the *Neirbo* case all requirements as to venue were waived.

Jurisdiction over the person of the petition was acquired through service of process pursuant to Rule 4(f) Rules of Civil Procedure. Neither the venue nor the jurisdiction of the court was extended by this method of service, because venue was properly laid in the Northern District, and that court had jurisdiction of the subject matter. Jurisdiction of the court means "jurisdiction of the subject matter," a meaning obviously quite different from jurisdiction of the person. Rule 4(f) merely provided a simple and convenient method whereby the person of pe-

petitioner doing business in, and having a process agent within the boundaries of the state, might be brought before any federal court in the state having jurisdiction of the subject matter. Thus, construed the Rule is procedural, and does not affect substantive rights. In addition to all this, petitioner, by appointing a resident agent for service of process, expressly consented that service on that agent should give the court jurisdiction over its person.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

W. E. GORE

H. H. CREEKMORE

RUFUS CREEKMORE

APPENDIX "A"

MISSISSIPPI CODE 1942, SEC. 5319

§5319. RESIDENT AGENT: HOW DESIGNATED.—

Every domestic corporation shall maintain an office in the county of its domicile in this state, either in charge of an officer or officers of the corporation, or in charge of some persons or corporation duly designated as resident agent, for the service of process by the directors (by whatever name called) of such corporation, a duly certified copy of the resolution designating such resident agent, and the written acceptance of such agency by the agent, to be filed with the secretary of state. In the event of the death, resignation or removal of such resident agent, another shall be substituted within thirty days in the same manner and accompanied by the same fee as in the former appointment; and until such substitution, or in event of the failure of a corporation to so designate and qualify a resident agent where one is required by this act, the secretary of state shall be the agent for the service of process upon such corporation without resident agent, until one shall have been designated as herein provided.

Every foreign corporation doing business in the state of Mississippi, whether it has been domesticated or simply authorized to do business within the state of Mississippi, shall file a written power of attorney designating the secretary of state or in lieu thereof an agent as above provided in this section, upon whom service of process may be had in the event of any suit against said corporation; and any foreign corporation doing business in the state of Mississippi shall file such written power of attorney before it

shall be domesticated or authorized to do business in this state, and the secretary of state shall be allowed such fees therefor as is (sic) herein provided for designating resident agents. Any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of this state.

APPENDIX "B"

§4055. STATE OFFICERS—LEGAL RESIDENCE OF, FIXED.—All public officers of this state, who are required to, or who for official reasons, remove from the county of their actual household and residence to another county of this state for the purpose of performing the duties of their office shall be deemed in law in all respects to be householders and residents of the county from which they so remove unless such officer elects to become an actual householder and resident of the county to which he removed for official causes.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 234

MISSISSIPPI PUBLISHING CORPORATION,

Petitioner,

vs.

DENNIS MURPHREE,

Respondent

REPLY TO PETITIONER'S ADDITIONAL
MEMORANDUM

W. E. GORE.
H. H. CREEKMORE.
RUFUS CREEKMORE.

SUPREME COURT OF THE UNITED STATES

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Assuming, for the argument, that the preliminary draft of the proposed revision and codification of the Judicial Code is intended to be no more than an authoritative declaration of the law as it now stands, which, of course, is a false premise, yet it is apparent that the provision dealing with venue (Sec. 1391) as contained in the preliminary draft can afford no support to petitioner's argument, for the following reasons:

(1) Paragraph (a) of Section 1391 provides that a corporation may be sued in any judicial district in which it is incorporated, or in which it is doing business or in which it is *licensed* to do business. The Mississippi Publishing Corporation is licensed to do business throughout the State of Mississippi, not only in the Southern District where it ac-

tually does business, but also in the Northern District where, without further authorization from the State of Mississippi, it may, whenever it sees fit, do business. By this paragraph of Section 1391 the Committee proposes to write into the statute the doctrine of the *Neirbo* case, namely, that by qualifying to do business in a state the foreign corporation thereby waives all questions of venue, and consents to be sued in any of the federal courts sitting in that state.

(2) By paragraph (b) of Section 1391, the Committee undertakes to preserve intact the presently existing right of a plaintiff to bring suit in the district of his residence, in cases wherein jurisdiction is founded only on diversity of citizenship. The change of the words "plaintiff or defendant" as now contained in Sec. 51, to "all plaintiffs or all defendants" as contained in the Committee's draft, was merely in recognition of the decisions of this Court holding that the words thus used in the singular, should be construed in the plural, that is, in a collective sense. In this case the only plaintiff was Dennis Marphree, and the suit was filed in the district of his residence.

Respectfully submitted,

W. E. GORE.

H. H. CREEKMORE.

RUFUS CREEKMORE.

(1970)

SUPREME COURT OF THE UNITED STATES.

No. 234.—OCTOBER TERM, 1945.

Mississippi Publishing Corporation,	} On Writ of Certiorari to	
Petitioner,		the United States Circuit
vs.		Court of Appeals for the
Dennis Murphree.	} Fifth Circuit.	

[January 2, 1946.]

Mr. Chief Justice STONE delivered the opinion of the Court.

Respondent, a resident of the northern district of Mississippi, brought this suit in the district court for that district against petitioner, a Delaware corporation having an office and place of business in the southern district of Mississippi, to recover damages for libel published in the southern district. The suit was begun by service of summons in the southern district by the United States marshal upon the agent designated by petitioner to receive service of process within the state. The questions for our decision are whether the venue was properly laid in the northern district, and whether petitioner could be brought before the court and subjected to its judgment in the suit by service of summons on petitioner's agent in the southern district.

The district court granted petitioner's motion to dismiss the suit on the ground that the venue was not properly laid in the northern district. The Circuit Court of Appeals for the Fifth Circuit reversed, 149 F. 2d 138, holding that as there was diversity of citizenship and as the amount in controversy exceeded \$3,000, the district court for the northern district had jurisdiction, that the venue was properly laid there under the provisions of § 51 of the Judicial Code, 28 U. S. C. § 112, and that service of summons in the southern district was authorized by Rule 4(f) of the Federal Rules of Civil Procedure. We granted certiorari. — U. S.

¹ The lower courts have not been consistent in the application of Rule 4(f). Compare Contracting Division, A. C. Horn Corp. v. New York Life Ins. Co., 113 F. 2d 864; Gibbs v. Emerson Electric Mfg. Co., 29 F. Supp. 810; Melikov v. Collins, 30 F. Supp. 159; Carby v. Greco, 31 F. Supp. 251; Richard v. Franklin County Distilling Co., 38 F. Supp. 513, with the opinion

The present case being of a civil nature, the amount in controversy exceeding \$3,000, and the parties being of diverse citizenship, the district court had jurisdiction of the subject matter of the suit, that is, of the class of cases of which the present is one. 28 U. S. C. § 41(1). The court had jurisdiction over the parties if the petitioner was properly brought before the court by the service of process within the southern district. And it could rightly exercise its jurisdiction, notwithstanding petitioner's motion, unless there was want of venue. Venue in the present case is controlled by § 51 of the Judicial Code, 28 U. S. C. 112, which provides, with exceptions not now material, that "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suits shall be brought only in the district of the residence of either the plaintiff or the defendant"

Since there was jurisdiction of the present suit on the sole ground of diversity of citizenship and since the suit was brought in the district of the plaintiff's residence, as found by both courts below, there was, by § 51 of the Judicial Code, no want of venue and the court was not warranted in dismissing the suit if the service of summons was effective to make the defendant a party. *Neirbo Co. v. Bethlehem Corp.*, 308 U. S. 165, on which petitioner relies, supports no different conclusion. There the sole ground of jurisdiction was diversity of citizenship of the parties. The foreign corporation was sued in the district court for southern New York, in which neither the plaintiff nor the defendant was a citizen or resident,² but where the defendant was doing business, maintained an office, and had consented to be sued by appointing a resident agent to receive service of process. Recognizing that § 51 of the Judicial Code, in cases where the jurisdiction is founded on diversity of citizenship, establishes venue as the place where the suit may be maintained for the convenience of the parties, and that the statutory venue for a suit of which the court has jurisdiction may be

of the Court of Appeals in the present case, 149 F. 2d 138; *Devier v. George Cole Motor Co.*, 27 F. Supp. 978; *Zwerling v. New York & Cuba Mail S. S. Co.*, 33 F. Supp. 721; *Williams v. James*, 34 F. Supp. 61; *Salvatori v. Miller Music Inc.*, 35 F. Supp. 845; *Andrus v. Younger Bros.*, 49 F. Supp. 499; and *O'Leary v. Lofton*, 3 F. R. D. 36.

² For purposes of jurisdiction a corporation is a citizen or resident only of the state of its organization. *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 451; *In re Kearsbey & Mattison Co.*, 160 U. S. 221, 229; *Macon Grocery Co. v. Atlantic Coast Line*, 215 U. S. 501, 509; *Seaboard Co. v. Chicago, etc., Ry. Co.*, 270 U. S. 363, 366.

waived, we held that the corporation had waived objections to venue by its consent to the suit. By designating an agent to receive service of process and consenting to be sued in the courts of the state, the corporation had consented to suit in the district court, being a court sitting for a district within the state and applying there the laws of the state, and it had thus waived the venue provisions of § 51 of the Judicial Code. 308 U. S. at 175. Cf. *Railroad Co. v. Harris*, 12 Wall. 65; *Lafayette Ins. Co. v. French*, 18 How. 404; *Ex parte Schollenberger*, 96 U. S. 369. In the present suit there was no occasion to establish waiver of objections to venue in the northern district of Mississippi, since the statute had provided in advance that there should be venue in the district court for the northern district, where respondent resided.

Unlike the consent to service in the *Neirbo* case the consent to service of process on petitioner's agent throughout the state was not significant as a waiver of venue, but it was an essential step in the procedure by which petitioner was brought before the court and rendered amenable to its judgment in the northern district. By consenting to service of process upon its agent residing in the southern district, petitioner rendered itself "present" there for purposes of service. See *Ex parte Schollenberger*, *supra*, 377; cf. *International Shoe Company v. Washington*, No. 107, this term. Had Congress specifically authorized service there for purposes of suit in the northern district, petitioner would have been properly brought before the district court for the purposes of the present suit, since Congress could provide for service of process anywhere in the United States. *Toland v. Sprague*, 12 Pet. 300, 328; *United States v. Union Pacific R. R. Co.*, 98 U. S. 569, 604; *Robertson v. Labor Board*, 268 U. S. 619, 622.

Congress, having omitted so to direct, the omission was supplied by Rule 4(f) of the Rules of Civil Procedure, which provides that "All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held." In the present case the service was made pursuant to Rule 4(d)(3) by the United States Marshal, who delivered the summons to the agent of petitioner designated to receive the service. If the service of the summons was valid petitioner was properly brought before the court in the northern district, which had venue and jurisdiction of the subject matter of the suit.

It is said that petitioner, by appointing an agent to receive service, has only consented to service of process in suits brought in the state courts and in conformity to state statutes regulating the venue, and that in any case Rule 4(f) was adopted without authority since the Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. § 723b, which authorized the promulgation of rules of practice for the district courts, directed that they "shall neither abridge, enlarge, nor modify the substantive rights of any litigant," and because the construction given to Rule 4(f) by the court below is inconsistent with Rule 82 which provides that the rules "shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein."

The answer to the suggestion that the consent to suit in the state is a consent to suit only in the state courts and subject to state statutes regulating venue in those courts is plain. Such consent has been uniformly construed to mean suits within the state which apply the law of the state, whether they be state or federal courts. See *Neirbo Co. v. Bethlehem Corp.*, *supra*, 171; cf. *Ex parte Schollenberger*, *supra*, 377; *Madisonville Traction Co. v. Mining Co.*, 196 U. S. 239, 255-256; *Louisville & Nashville R. Co. v. Chatters*, 279 U. S. 320, 329. And since the consent is to suits in the federal courts, it is a consent to suits brought in conformity to the federal regulations governing the jurisdiction, venue and procedure of those courts. *Ex parte Schollenberger*, *supra*, 377; *Neirbo Co. v. Bethlehem Corp.*, *supra*, 175.

The question remains whether Rule 4(f) is an effective means of bringing the petitioner before the district court in the northern district where the suit was properly brought in conformity to § 51 of the Judicial Code. The fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency. But in ascertaining their meaning the construction given to them by the Committee is of weight. Rule 4(f), as explained by the authorized spokesmen for the Advisory Committee, see *Proceedings of Washington and New York Institute on Federal Rules*, 291, 292; *Proceedings of The Cleveland Institute on the Federal Rules*, 205, 206, was devised so as to permit service of process anywhere within a state in which the district court issuing the process is held and where the state embraces two or more districts. It was adopted with particular reference to suits against

a foreign corporation having an agent to receive service of process resident in a district within the state other than that in which the suit is brought. It was pointed out that the rule did not affect the jurisdiction or venue of the district court as fixed by the statute, but was intended among other things to provide a procedural means of bringing the corporation defendant before the court in conformity to its consent, by serving the agent wherever he might be found within the state. See also Hughes, *Federal Practice*, Vol. 17, § 18993; Moore, *Federal Practice*, Vol. 1, p. 360-361.

It is true that the service of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served. But it is evident that Rule 4(f) and Rule 82 must be construed together and that the Advisory Committee, in doing so, has treated Rule 82 as referring to venue and jurisdiction of the subject matter of the district courts as defined by the statutes, §§ 51 and 52 of the Judicial Code in particular, rather than the means of bringing the defendant before the court already having venue and jurisdiction of the subject matter. Rule 4(f) does not enlarge or diminish the venue of the district court, or its power to decide the issues in the suit, which is jurisdiction of the subject matter, *Industrial Assn. v. Comm'r*, 323 U. S. 310, 313, to which Rule 82 must be taken to refer. Rule 4(f) serves only to implement the jurisdiction over the subject matter which Congress has conferred, by providing a procedure by which the defendant may be brought into court at the place where Congress has declared that the suit may be maintained. Thus construed, the rules are consistent with each other and do not conflict with the statute fixing venue and jurisdiction of the district courts.

We think that Rule 4(f) is in harmony with the Enabling Act which, in authorizing this Court to prescribe general rules for the district courts governing practice and procedure in civil suits in law and equity, directed that the rules "shall neither abridge, enlarge, nor modify the substantive rights of any litigant." Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon

The rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights. *Sibbach v. Wilson & Co.*, 312 U. S. 1, 11-14. The fact that the application of Rule 4(f) will operate to subject petitioner's rights to adjudication by the district court for northern Mississippi will undoubtedly affect those rights. But it does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights. It relates merely to "the manner and the means by which a right to recover . . . is enforced." *Guaranty Trust Co. v. York*, No. 264, 1944 term, decided June 18, 1945. In this sense the rule is a rule of procedure and not of substantive right, and is not subject to the prohibition of the Enabling Act.

The judgment is

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.